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HORNBOOK CASE SERIES

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ILLUSTRATIVE CASES
ON
INSURANCE

By ROGER W. COOLEY

PROFESSOR OF LAW, UNIVERSITY OF NORTH DAKOTA

AUTHOR OF "BRIEFS ON THE LAW OF INSURANCE;" "ILLUSTRATIVE CASES ON
DAMAGES;" "ILLUSTRATIVE CASES ON PERSONS AND DOMESTIC RELATIONS"

A COMPANION BOOK TO VANCE ON INSURANCE

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HORNBOOK CASES

ON THE

LAW OF INSURANCE

THE NATURE AND REQUISITES OF THE CONTRACT

I. The Nature of the Insurance Contract In General¹

In re HOGAN.

(Supreme Court of North Dakota, 1899. 8 N. D. 301, 78 N. W. 1051, 45 L. R. A. 166, 73 Am. St. Rep. 759.)

BARTHOLOMEW, C. J.² One C. N. Hogan presented to this court his petition for a writ of habeas corpus, alleging that he was unlawfully restrained of his liberty by the sheriff of Foster county, in this state. His petition sets forth that he was arrested upon a warrant issued by a justice of the peace of said county, which said warrant was based upon a complaint duly laid before said justice by one Ferguson, wherein said petitioner was accused of having acted as agent for an insurance company without having procured the certificate required by section 3124, Rev. Codes of this state, that a preliminary hearing was duly had before said justice, and that upon such hearing said justice adjudged that the petitioner be held to answer to said charge before the district court of said county, and fixed his appearance bond at the sum of \$500, which the petitioner failed to give, whereupon he was duly committed to the custody of said sheriff, and was by him restrained. * * *

No point is made by petitioner as to the regularity of any of the proceedings that led up to his incarceration. They are concededly regular. It is admitted, also, that petitioner was soliciting business as agent for a corporation known as the Realty Revenue Guaranty

¹ For discussion of principles, see Vance on Insurance, §§ 22, 23. See, also, Cooley, Briefs on the Law of Insurance, vol. 1, pp. 2-38.

² Part of the opinion is omitted.

Company, of Minneapolis, Minn. It is admitted that petitioner never procured the certificate of authority specified in said section 3124, and that he took an application from the complaining witness in form as set forth in the evidence, and procured for said witness the contract of said company as set out in the evidence, and took the promissory note of the witness, secured by chattel mortgage, for the consideration mentioned in said contract. These admissions leave but one question for our determination: Is or is not the Realty Revenue Guaranty Company, in fact or in effect, an insurance company? If it be, then clearly the petitioner was properly held; otherwise, he should be discharged. While the attorneys representing the state claim that the oral evidence in the record strengthens their claim that said corporation is in fact an insurance company, yet we shall rest our conclusions on this point upon the documentary evidence.

Our statute (section 4441, Rev. Codes) defines insurance as follows: "Insurance is a contract whereby one undertakes to indemnify another against loss, damage or liability arising from an unknown or contingent event." Necessarily, in defining insurance in a single sentence, only the most general terms can be used, and any general definition must be extended to cover the ever-changing phases in which the subject is presented to the public. Fifty years ago it was thought that a single chapter in any work on contracts could exhaust the law of insurance. Now Mr. Joyce presents the subject in four elaborate volumes, showing the immense development of that branch of the law. Mr. Joyce expressly defines one line of insurance as guaranty insurance. See 1 Joyce, Ins. §§ 12, 13. True, guaranty insurance, as there defined, relates more particularly to guaranty against loss by reason of breaches of contract, such as "fidelity guaranty" and "credit guaranty." But we have real estate title guaranty insurance; and, while perhaps this is the first instance where an attempt has been made to guaranty a realty revenue, yet as the revenue arising from that class of realty here involved, i. e. farming lands, is affected by so many contingencies, such as winds, hail, frost, drought, ravages of insects, etc.—contingencies which, while not likely to happen, yet such as may occur—it would seem that inherently it would be a proper subject for insurance, perhaps even an inviting field. In this record we find a copy of the articles of incorporation of the Realty Revenue Guaranty Company. The second article sets forth the general business of the corporation, naming a number of things that it is organized for the purpose of doing, and, among others, "to guaranty certain rental and produce income from lands and tenements."

The petitioner, as agent for said company, took from Peter Ferguson an application for a contract. The application was upon a printed form, headed, in bold type, "Realty Revenue Guaranty Company, of Minneapolis, Minn. Capital stock, \$100,000." Then fol-

lows the printed portion, which reads: "I, ———, of ——— P. O., county of ———, state of ———, do hereby apply to the Realty Revenue Guaranty Company for an option-sale contract of \$——— per acre, which is hereby referred to and made a part hereof, subject to all conditions therein contained upon all crops raised on the following described lands." Then follows a description of the land, and various questions to be answered by the applicant as to whether he is owner or tenant of the land, and what interest he has in the crop, what the land yielded per acre the year before, nature of the soil, etc.—all to be signed by the applicant.

Upon this application, Ferguson received a contract, which we copy in full: "This agreement, made by and between the Realty Revenue Guaranty Company, of Minneapolis, Minnesota, and Peter Ferguson, of Carrington P. O., county of Foster, and state of North Dakota, party of the second part, witnesseth that, in consideration of an application for this contract, which is hereby referred to and made a part hereof, and the payment of the sum of \$55, according to the conditions of a certain promissory note for said amount, by said party of the second part, the above-named Realty Revenue Guaranty Company agrees to purchase the entire crop of small grain, consisting of wheat, oats, flax, barley, corn, or rye, from said party of the second part, at the rate of \$5.00 per acre, grown during the season of 1899; all of said crops being on the following described lands, to wit, 160 acres southeast quarter Sec. 20, T. 146, R. 65; 60 acres northwest quarter Sec. 26, T. 146, R. 65. It is further agreed that said party of the second part is in no manner bound to sell said crops to the said Realty Revenue Guaranty Company, except at his own option. It is further agreed that said party of the second part shall cultivate said crops in a husbandlike manner, sow, plant, garner, gather, harvest, thresh, and otherwise care for said crops in due season and in an economical manner. Said party of the second part agrees to notify said Realty Revenue Guaranty Company in case of any damage to said crops within five days thereafter, and of his intention to avail himself of his option to sell before said crops are harvested, and shall, within five days after threshing the same, give notice to the company of his election to sell under this contract. After said election to sell, said party of the second part agrees to deliver said crops at the nearest market, if directed so to do by said Realty Revenue Guaranty Company. Should the party of the second part fail to perform any of the conditions herein by him to be performed, time being the essence hereof, or if any of the warranties or statements made by him are untrue, the said option shall terminate. Nor shall said guaranty company be liable under this contract should any damage or loss accrue to said crops after September 15 of this year, or after said crops are harvested, nor in any manner, except as herein stipulated. This contract shall terminate December 1st following date hereof. In

witness whereof, the said Realty Revenue Guaranty Company has caused these presents to be executed and signed by its president and secretary, and caused its corporate seal to be hereto attached, this seventh day of April, 1899. Realty Revenue Guaranty Co., by L. E. Utley, President. A. L. Brice, Secretary. [Corporate Seal.]”

What was the object of this contract and what was its legal effect? The petitioner says it was an option contract of sale of a crop. We cannot conceive that the farmer's primary object was to sell his crop. Ordinarily a man does not pay a premium for the privilege of selling his produce. Nor was it the primary purpose of the company to purchase the crop. From the very terms of the contract, it is certain that it must lose money upon all the grain it buys under the contract. Moreover, grain is bought and sold by the bushel, and not by the acre. We think the contract was the identical contract which the articles of incorporation authorize the company to enter into. It was a contract by which the guarantor undertook to guaranty or assure to the farmer a certain revenue from his land. How did the parties proceed to execute such a contract? It was well known to both parties that an acre of land in this state, farmed as the farmer contracts to farm it in this case, will produce a crop of a value far in excess of five dollars, and the value can be reduced to or below that figure only by the happening of one or more of the contingencies hereinbefore mentioned. But such contingencies may happen, and to be absolutely assured that his land will yield him at least five dollars per acre the farmer is willing to pay something; and the corporation, expecting to do business over a wide scope of country, believes that it can with profit to itself assure the farmer a crop worth five dollars per acre for the compensation which the farmer is willing to pay therefor. But what is this in substance except a contract to indemnify the farmer against loss arising from the happening of a contingent event, and that is our statutory definition of insurance. The farmer was seeking and paying for protection, and the corporation was seeking to make a profit by extending this protection for the consideration paid by the farmer. True, it is not all loss that is insured against. The contingencies named may reduce the value of a crop from twenty dollars per acre until, in the judgment of the owner, it barely exceeds five dollars per acre, and there is no liability under the contract. It is the loss below five dollars per acre that is insured against. The effect of the contract is very like that of a valued policy of insurance. When the contingency happens that creates a liability under the policy, then the full amount of the policy must be paid, but the insured is entitled to all the salvage.

In *Claffin v. System Co.*, 165 Mass. 501, 43 N. E. 293, 52 Am. St. Rep. 528, the defendant was held to be an insurance company. The contract is thus stated by the court: “It was made on April 6, 1891, and purports to bind the defendant, in consideration of a sum paid, to purchase at a fixed price the accounts which during one year a

certain business firm should have against ascertained insolvent debtors, or judgment debtors against whom execution should be returned unsatisfied." A contract to purchase bad accounts and judgments at a fixed price, irrespective of value, cannot be distinguished in principle from a contract to purchase damaged crops at a fixed price, irrespective of value. That same company was held to be an insurance company in Shakman v. Same, 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920, and the reasoning of the court is very pertinent to this case.

It is doubtless true that there has been a studied effort to keep this corporation outside the operation of our insurance laws; but the purpose and effects of its contracts are too clear to admit of doubt. They exactly meet the requirements of an insurance contract, and the corporation for which petitioner acted as agent is an insurance company. The act charged in the complaint is a crime under our statutes, and there is reasonable and probable cause to believe the petitioner guilty of committing the act. He is therefore properly held.

The writ issued in this case is discharged, and petitioner remanded to the custody of the sheriff of Foster county. All concur.

STATE v. BEARDSLEY.

(Supreme Court of Minnesota, 1902. 88 Minn. 20, 92 N. W. 472.)

Earl D. Beardsley was convicted of acting as an insurance agent without having complied with the requirements of the insurance act of 1895 (Gen. Laws 1895, c. 175), and appeals.

COLLINS, J.* The defendant was indicted and convicted under section 101, c. 175, Gen. Laws 1895, of the offense of assuming to act as the agent of an insurance company without first having procured a license or certificate of authority to so act. That he solicited and secured the person named in the indictment to enter into a contract, a copy of which was made a part thereof, and that, as agent, he delivered it to the same person, is not disputed, so the principal question at issue is whether this contract was one for insurance, within the meaning of the insurance code, above mentioned. Upon this question it is contended by defendant's counsel that this particular instrument is not a contract of insurance, as such a contract is defined by either section 3 or section 63 of chapter 175, or within any of the provisions of chapter 175. * * *

It appears from the contract that the Home Co-operative Company, for which defendant was acting, and whose contract he delivered as its agent, is a copartnership organized in the state of Kansas. It consists of a number of citizens of that state, and under that name

* Part of the opinion is omitted.

enters into its contracts as party of the first part; the party of the second part being the holders of the contracts. The latter are not in any sense members of the copartnership or company. The company is entitled to all profits which may arise in carrying out its contracts, and must bear all losses, if there be any. A stipulated amount is paid monthly by each contract holder as a premium, and there is no provision for levying assessments upon such holders to cover losses or shortages. The company assumes the only obligation there is in the contract, aside from the holder's promise to pay his monthly premium, and therefore it is not co-operative; nor is it a benevolent association, except as it may, through its plan of operations, be beneficial to a contract holder or to his family, precisely as is a life insurance company to a beneficiary in case of the death of the assured. Contract holders co-operate with each other to the same and to no greater extent than do policy holders in ordinary life insurance companies. Each holder of a contract—all contracts being numbered in consecutive order—promises to pay a membership fee of \$3, and the sum of \$1.35 each month, up to and prior to what is designated as the maturity day of his contract. Of this \$1.35, \$1 is credited to the account of the contract holder, and is to be applied to the purchase of a home for him, according to a somewhat mystifying plan previously formulated. Ten cents of the payment is kept as a reserve fund to meet "contingent liabilities" of the company when performing its contracts, and the balance, 25 cents, is taken to defray the company expenses, including compensation for services. What is done with the membership fee, does not appear.

The monthly payments of \$1.35 are made by a contract holder until \$50 have been accumulated from payments upon his contract, and from payments upon like, but subsequently made and numbered, contracts with other persons; and then this particular contract is deemed to have matured, and its holder entitled to receive installments of \$50 per month, to be applied on the payment for his home until the full sum of \$1,000 is paid; and, when this sum is paid in monthly installments, the contract is fully performed by the company. If the holder of a matured contract avails himself of his installment privilege, and prepares to build a house, on which the company is to have security, he must then and thereafter pay to the company \$5.35 each month, instead of \$1.35. Five dollars of this amount is placed to his credit, and the balance, 35 cents, is disposed of precisely as it had been before his contract matured. When the monthly payments, of \$5 each, aggregate the sum of \$1,000, less the amount the holder had to his credit on account of \$1 payments per month before his contract matured, the lien of the company for the money advanced expires, the debt is discharged, and a clear title to the property is vested in the contract holder. This is the plan of operations through which the latter is supposed to finally secure his home, fully paid for, and free of all liens.

~~It seems to be admitted that, were it not for subsequent provisions,~~ this contract would not be one for insurance, but the state relies upon another clause; the disability referred to being that of the contract holder, which is as follows: "Should his disability be total, permanent, and determined by satisfactory evidence, the unpaid balance of one thousand dollars provided for in this contract shall be paid to clear the home of the party of the second part, and his indebtedness to the parties of the first part shall be discharged, and the title to the property, if held by the parties of the first part, shall be conveyed as he may direct. In the event of his death before all advance payments to him shall have been returned to the first parties, the parties of the first part shall pay the balance, if any, of the one thousand dollars contracted for, and shall cancel his indebtedness to the first parties, and, if the title to the property purchased is in the first parties, they shall convey the same to his wife, if any; if there shall be no wife, then to his heirs. If the second party is over fifty years of age at the signing of this contract, the provisions to give his wife or heirs a clear title in case of his death, unless accidental, do not apply. In case of his death, unless accidental, his wife or heirs must continue the payments according to the obligations of the second party."

It is contended in behalf of the state that this provision constitutes the contract one for insurance, and subjects the defendant to the license clause of chapter 175. By this provision, if the contract holder's disability becomes total and permanent, the company agrees to pay the unpaid balance of the \$1,000 which the holder has obligated himself to pay to it in \$5 installments, and for which payment the company has a lien upon the property, for the purpose of clearing and discharging the lien; and, if this agreement is performed, the entire indebtedness is canceled, and the title to the property vested as the holder may direct. In the event of the holder's death before all monthly payments have been made by him, and his obligation to the company discharged in full, the latter agrees to pay the balance of his indebtedness, and to cancel the amount remaining unpaid, and, if it holds title to the property, to convey the same to his wife, if there be one, and, if not, to his heirs. The precaution is taken by the company to exclude from the operation of this last provision contract holders over the age of 50 years, unless death shall be accidental. This promise becomes effective only in the case of disability or death, and, if either occur, the company is obliged to release its claim for further payments, and to remit the remaining debt.

This is a valuable promise made to the contract holder for a consideration, namely, his monthly payments. If he becomes disabled, the company promises to do an act of value to him. If he dies, the promise is to do an act of value to his widow or to his heirs; that is, an act equivalent to, and actually involving, the payment of money, conditioned upon the cessation of human life. The real character of

this promise, or of the act to be performed, cannot be concealed or changed by the use or absence of words in the contract itself; and it is wholly immaterial that on its face this contract does not expressly purport to be one of insurance, and that this word nowhere appears in it. Its nature is to be determined by an examination of its contents, and not by the terms used. The performance of the contract may be enforced by the holder in case of disability, or by his widow or heirs in case of his decease. If it does not come within the definition of an insurance contract, as found in section 3 (that is, if it is not an agreement by which one party, for a consideration, promises to pay money or its equivalent, or to do some act of value to the assured, upon the destruction or injury of something in which the other party has an interest), it involves the payment of money or something else of value to the family or representatives of the holder, conditioned upon the continuance or cessation of human life, and is covered by the definition found in section 63. It is an agreement involving and providing, in effect, for the indirect payment of money by the relinquishment of a debt; and there is no substantial distinction between such an agreement or obligation and the ordinary life insurance policy. The obligation in each case is conditioned upon the cessation of human life. * * * Judgment affirmed.⁴

STATE v. TOWLE.

(Supreme Judicial Court of Maine, 1888. 80 Me. 287, 14 Atl. 195.)

PETERS, C. J. The state sues to recover a penalty of the defendant for acting as a soliciting agent for the Single Men's Endowment Association, a company having its home in the state of Minnesota, and doing business in this state without a license from the insurance commissioner. The question is whether or not this association in an insurance company, under the provisions of Rev. St. c. 49, § 73.

The contract between the company and its patrons declares the duties which must be assumed by the single man who becomes privileged to an endowment in the association. He pays \$10 as an initiation fee; \$2 as annual dues each year for nine years, and as much longer as he remains single; \$1.25 on the marriage of any associate; and he promises, on the pain of forfeiture of all rights accruing to him, that

⁴ Compare *Trust Co. v. Krumseig*, 77 Fed. 41, 23 C. C. A. 1 (1896).

As illustrating the discordant views taken by the courts of one and the same kind of contract, compare *Physicians' Defense Co. v. O'Brien*, 100 Minn. 490, 111 N. W. 396 (1907), and *State ex rel. Physicians' Defense Co. v. Laylin*, 73 Ohio St. 90, 76 N. E. 567 (1905). The corporation involved in these cases issued a contract by which, in consideration of a stipulated amount, it agreed to defend physicians against all suits for damages for malpractice at its own expense, not exceeding a certain amount, but did not assume or agree to assume or pay any judgment rendered. The supreme court of Minnesota held this to be an insurance contract, while the supreme court of Ohio regarded it as a contract for services only.

he will not himself marry within two years from the date of his admission to the association. For the performance by him of these undertakings, the company promises to pay to his wife, if married to him after the expiration of the two years, the sum of as many dollars as there are associates in the order, not exceeding \$1,000, provided that there be that amount of money in the treasury at the time, or it can be collected by an assessment upon the associates. No word is spoken of insurance. That it is a wagering or gambling contract, and void upon grounds of public policy, because in restraint of marriage, there is no room for doubt. The same or similar contract has been held to be void in *White v. Benefit Union*, 76 Ala. 251, 52 Am. Rep. 325, and in *Chalfant v. Payton*, 91 Ind. 202, 46 Am. Rep. 586.

The counsel for both parties agree that the contract, for one reason or another, is illegal, but the counsel for the state contends that, whether the contract be legal or illegal, it is a contract of insurance, and that, as such, it falls under the supervision of the commissioner.

It is not to be conceded, we think, that this contract, in the sense of any modern use of the term, is an insurance policy. No loss or casualty or peril is named for which any indemnity is promised. It is more of a betting contract on a future event. It is true that there was formerly a class of betting contracts styled "insurances," and that a narrow line once existed between gambling and betting contracts and those then denominated contracts of insurance; and the case of *Paterson v. Powell*, 9 Bing. 320, relied on by the state, shows how far a court was induced to go to determine that a contract similar in principle to the present was an insurance policy, in order to declare it void. The statute (4 Geo. III. c. 48) rendered speculative insurance contracts void, and, strange to say, allowed all contracts founded on mere bettings and gamblings to be valid. At this day, the contract in that case, with all its imitations of the thing, would hardly receive the appellation of an insurance policy.

It does not seem probable that the Legislature intended to commit to the care of the commissioner the business of illegal or illegitimate insurance companies. It would be tolerating, instead of condemning, them. He has the power to issue and suspend licenses. But there must be cause for either act. Rev. St. c. 49, §§ 73, 75. His business is to deal with such companies as can, when licensed, issue legal policies. His act cannot confer legality upon companies doing illegal business. The state seeks to recover a penalty of \$50, because the defendant acted without an official license, while the policy, if to be called such, issued by him, would be unlawful and void, whether he was acting with or without a license. It would be inconsistent to collect a penalty of an agent for not doing business under a void license. Plaintiff nonsuit.⁵

⁵ A contract to furnish burial expenses construed as an insurance contract, see *State v. Willett*, 171 Ind. 296, 86 N. E. 68, 23 L. R. A. (N. S.) 197 (1908).

II. A Personal Contract *Uberrimæ Fidei* *

1. IN GENERAL

QUARLES v. CLAYTON.

(Supreme Court of Tennessee, 1889. 87 Tenn. 308, 10 S. W. 505, 3 L. R. A. 170.)

Agreed case between Nancy M. Quarles and J. A. Clayton, administrator of her deceased husband's estate, to determine the rights of the parties to the proceeds of a policy of fire insurance issued to the deceased. Decree for the administrator, and Mrs. Quarles appeals.

LURTON, J. The deceased husband of appellant took out a policy of fire insurance upon his dwelling; loss payable to the assured, his executors or administrators. Before the expiration of the policy by time, but after the death of the assured, the house was accidentally burned. The insurance company, by consent of the claimants, paid the loss into the hands of the defendant, under an agreement that the fund should be held subject to the legal rights of complainant, if any she had, to be thereafter determined by the courts. An agreed case was made up, and submitted to the chancery court, and from the decree of the chancellor Mrs. Quarles has appealed.

Appellant is the widow of the assured, and claims a life estate in the fund, upon the following state of facts:

Before her marriage to the assured, a marriage contract was entered into, and duly executed, and registered in the county of their residence, by which, among other things not material to be here mentioned, it was agreed "that all the property and estate, both real and personal, now owned or hereafter acquired by said John W. Quarles, shall continue to be his, and shall remain wholly unaffected by said contemplated marriage with said Mrs. Nancy M. Kirk, in favor of whom no marital or other rights on his said property and estate shall attach or inure by reason of said contemplated marriage relation, further, or otherwise, than is expressed and provided in this instrument; and he hereby reserves the right and privilege of making such suitable provision for her out of his estate as he may at any time desire, either by deed of gift, last will and testament, or otherwise. If he die without making any such provision for her, then she shall out of his real estate, if she survive him, have a comfortable home, to consist of, say, about one hundred and forty acres of his lands, in which will be included his dwelling and outhouses; the same to be surveyed and laid

* For discussion of principles, see Vance on Insurance, §§ 26, 27. See, also, Cooley, Briefs on the Law of Insurance, vol. I, pp. 78-85.

off to her by proper metes and bounds, and in such manner as will be most useful and convenient to her, and with least injury to his estate. This home, so laid off to her, to be and remain to her own proper use, support, and benefit for and during the term of her natural life, and, after her death, to take such directions as he may give to it by his last will and testament, or other proper mode of disposing of real estate; and if he die without any will, and without disposing of the remainder interest in said 'Home,' as above provided for and described, then the same shall descend to his proper heirs and distributees according to the laws of the state of Tennessee."

After the marriage, the dwelling house above described, which was then and after the residence of Mr. Quarles and his wife, was insured under a contract, as before stated, that the loss should be paid to the assured, the husband of appellant, his executors or administrators.

Mr. Quarles died intestate, and without having, by deed or otherwise, made any provision for his widow other than that contained in the marriage contract. The widow continued to occupy the dwelling as her residence until it was destroyed by fire. The portion of the farm of the decedent which was to be assigned to her under the marriage agreement had not, at the time of the fire, been laid off by metes and bounds; but it was subsequently done to the satisfaction of all concerned. This estate was so laid off, as required by the contract, as to include the outhouses of the assured, and likewise the site of the burned mansion house. The insurance policy was not taken out upon any agreement or contract, express or implied, with appellant, that she was to have any interest whatever therein.

Under this state of facts, has appellant any equitable or legal interest in the proceeds of this fire policy? That the precise boundaries of the 140 acres to be laid off to her had not been ascertained by survey at the time of the fire can cut no figure, because it was to be laid off, in all events, so as to include the mansion house and the outhouses. It seems equally clear that she cannot hold the estate of her husband responsible for the value of the house, because, at his death, her contingent right to the house for her life ripened, and became a vested interest for her life; and at the moment her husband died intestate, and without having made any other provision for her, the house was standing, and her right to the use and possession at once accrued. Her interest became at once an insurable interest; and the destruction of the house by any means after her husband's death was not an injury for which his estate or his heirs would be responsible.

Whatever right she has to any interest in this fund must arise from the contract of insurance. The person assured against loss in the policy issued upon the premises of Mr. Quarles was the owner himself. By all the authorities, a contract of fire insurance is a personal contract, and assures the interest alone of the assured in the property, in the absence of some agreement or trust to the contrary.

The policy taken out by Mr. Quarles contained the usual provision

prohibiting any assignment of the policy without the consent of the insurer. It also contained the further stipulation that the policy should become void "in case any change shall take place in title or possession, except by succession by reason of the death of the assured." These provisions have been upheld by the courts as reasonable conditions, limiting and restricting the liability of the insured. That they are reasonable is obvious, when we consider that the contract is one for the personal indemnity of the assured against a loss affecting his interest in the property covered by the policy. The insurer contracts with reference to the character of the assured for integrity and prudence. He might be very willing to agree to make good the loss of one, by the destruction of property owned by him, while he would be altogether unwilling to insure the same property if owned by another. Again, the contract undertakes to make good any loss which the assured may sustain; and from this it follows that, if the assured has parted with his interest before the loss, he cannot ask to be indemnified, because he has sustained no loss. The provision against the change of title is therefore in precise harmony with the personal character of the contract. In some fire insurance contracts the stipulation against change of title extends so far as to make the policy void should such change of title be brought about by the death of the assured. The title, in such case, is no longer in the assured, but has by law passed to his heirs, or by will to his devisees; and a change of title so occurring, has been held to defeat an action for a loss occurring after the death of the assured. *Sherwood v. Insurance Co.*, 73 N. Y. 447, 29 Am. Rep. 180; *Hine v. Woolworth*, 93 N. Y. 75, 45 Am. Rep. 176.

The contract is not, therefore, one which attaches to or follows the property, being one for the personal indemnity of the assured; and, where the insurer does not assent to the assignment of the policy to a grantee of the property, neither the assured nor his assignee of the property can recover upon the policy. *Hobbs v. Insurance Co.*, 1 Sneed, 444.

But this policy was not avoided by the death of the assured. It expressly provides that a change of title shall defeat the policy, except when it occurs "by succession by reason of the death of the assured." The legal effect of this exception is to continue and extend the policy notwithstanding the change of title by death of the assured. In whose favor is this continuance? It has been ably argued that the effect of this continuance is in favor of those who by "succession" take the property covered by the risk, and that, though it may be payable to the executor or administrator of the assured, yet he will, in case the risk was upon real estate, take and hold in trust for those who by "succession" have taken the property, and who are therefore the persons damaged by the loss. This word "succession," in the connection in which it appears, is a word of technical meaning, and refers to

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those who by descent or will take the property of a decedent. It is a word which clearly excludes those who take by deed, grant, gift, or any form of purchase or contract. This meaning is made most obvious when we consider that the contract provided against any change of title except by "succession;" and, to more directly affix a limited and technical meaning, the explanatory words are added, "by reason of the death of the assured."

There is much plausibility in the argument that, inasmuch as the policy is continued notwithstanding a change of title has occurred, in case the risk is upon real estate, the extension is by intendment of the contract, to operate as an indemnity to those who by "succession" have become the owners of the property. In such a case, neither the administrator nor the distributee would have any interest to be insured, while the heir or devisee upon whom the title has been cast would be the legal and equitable owner, and the person to suffer by the loss.

The root principle of insurance, that the loss is payable only to the extent that the assured has an insurable interest, would seem to preclude the administrator in such a case from any recovery, or make him a trustee for the heir of what he should recover when the loss occurred after the property had passed by "succession" to the heir. This seems to be the holding of the courts, when the question has arisen, although the text-book writers seem not to have seized upon the distinction. *Wyman v. Wyman*, 26 N. Y. 253; *Culbertson v. Cox*, 29 Minn. 309, 13 N. W. 177, 43 Am. Rep. 204. But does the appellant take any interest in the insured property by succession? If she had taken as devisee or under the homestead law, she would be within the principle just discussed, and would be within the express holding of the two cases last cited. Unfortunately for her, appellant takes whatever interest she has in the property under the fire policy by virtue of her marriage contract. She is not entitled to homestead or dower, for she expressly agreed to take, in lieu of all right which the law would have given her, the provision which she covenanted for by marriage contract. This interest was a contingent one. It depended upon two events: First, that she should survive her husband; and, second, that he should not by deed or will make any other provision for her. Both of these events occurred; and, instantly upon the death of her husband, she became seised of an estate for her life in the insured premises. She therefore took this mansion-house as the grantee of her husband, and did not take it by "succession."

But it is insisted that, however she acquired the estate, she has an equitable interest in a life estate in this fund, because it represents the premises which she had a right to occupy and enjoy during her life. This presents a strong case in morals, but her legal rights are not so clear. The rule is well settled that no equity attaches upon the proceeds of a fire policy in favor of third persons who, in the character of grantee, mortgagee, or creditor, may have sustained loss, in the absence of some trust or contract to that effect. *May, Ins. §*

456; 3 Kent, Comm. (10th Ed.) 499. This rule applies as well to vendors and lienors of every class as to mortgagees who may have had their security impaired by a loss by fire. This court, in a well-considered case, held that the holder of a mechanic's lien upon a building had no equitable lien in a fire policy effected by the owner, and assigned to a mortgagee. *Galyon v. Ketchen*, 85 Tenn. 55, 1 S. W. 508.

An equity will attach when the vendee or mortgagor was, by covenant or otherwise, bound to insure the property, for the better security of the creditor or vendor. In such a case the latter would have, to the extent of their interest in the property destroyed, an equitable lien upon the money due on a policy taken by the mortgagor or vendee or other debtor who had given a security upon the insured property; and this would be so, even though the policy stand in the name of the debtor, vendee, or mortgagor. But, in the absence of some such agreement, the mortgagor or vendee or grantor, having an insurable interest, might insure such interest for his own benefit; and no lien would attach thereto in favor of his creditor, secured by lien or mortgage or otherwise upon the insured property. *Carter v. Rockett*, 8 Paige (N. Y.) 437; *Wheeler v. Insurance Co.*, 101 U. S. 439, 25 L. Ed. 1055; *Nordyke v. Gery*, 112 Ind. 535, 13 N. E. 683, 2 Am. St. Rep. 219; *Sheld. Subr.* §§ 233, 235.

The agreed state of facts upon which this case is submitted fails to show any covenant, contract, agreement, or understanding that Mr. Quarles should insure this property for the benefit of appellant. The interest of appellant, after the death of her husband, was an insurable one; so was the remainder interest of the heirs. The decedent having left no debts, and the distributees being the same persons who take the real estate as heirs, no controversy arises as between the administrator and the remainder-men.

That the insurance company had the option to rebuild is urged as a reason why the insurer's election to pay, instead of rebuilding, ought not to operate to the disadvantage of complainant. This option is one common to all contracts of fire insurance; and the argument, if good in this case, would operate to overturn the well-settled rule that no equity attaches to the proceeds of a fire policy in favor of third persons who have suffered loss, in the absence of some agreement to that effect. If this option to pay or rebuild should be regarded as sufficient to found an equity upon in favor of third persons disappointed by the election of the insurer, the law of insurance would have to be rewritten. There is no privity between appellant and the insurer, and no action of his can be ground to give her an interest which she would not otherwise have.

The decree of the chancellor will be affirmed.

2. CONTRACTS OF FIRE INSURANCE NOT ORDINARILY ASSIGNABLE

NEW v. GERMAN INS. CO. OF FREEPORT.

(Appellate Court of Indiana, 1892. 5 Ind. App. 82, 31 N. E. 375.)

Action by John W. New against the German Insurance Company of Freeport, Ill. Judgment for defendant. Plaintiff appeals.

CRUMPACKER, J. This action was brought by New against the insurance company upon a policy of fire insurance issued by the defendant to one Pierson, covering certain buildings in the state of Missouri. The policy contained the following provision respecting the assignment thereof, and the change of title to the property insured: "If the property, or any part thereof, shall be sold, conveyed, incumbered by mortgage or otherwise, or any change takes place in the title, use, occupation, or possession thereof, whatever, or if foreclosure proceedings shall be commenced, or if the interest of the insured in said property, or any part thereof, now is or shall become any other than a perfect legal and equitable title and ownership, free from all liens whatever, except as stated in writing hereon, * * * or if the policy shall be assigned without written consent hereon, then, and in every such case, this policy shall be absolutely void."

It is alleged in the complaint that plaintiff became the owner of the property after the execution of the policy, by purchase, and the title was transferred to him by said Pierson by deed; that said Pierson transferred the policy to plaintiff by an assignment in due form indorsed thereon, and plaintiff then sent it to an agent of the defendant at Hopkins, Mo., to procure the defendant's consent to such assignment, but such agent returned the policy with notice that he had no authority to give the necessary consent, and suggested that plaintiff send it to the defendant's general agents, then residents of Maryville, Mo., who would, without any trouble, consent to said transfer in writing; that thereupon the plaintiff caused said policy to be forwarded to the said agents, who issued the said policy or caused the same to be issued, and who received the same by due course of mail; that they retained it some considerable time, and then returned it to the plaintiff by mail without any word of explanation, without any disapproval thereof, without any expression or word in regard to the same, and without returning or offering to return to him or the said Pierson any part of the unearned premium received on "said policy"; that plaintiff, on receiving said policy from said agents, supposed, and in good faith believed, that the necessary written consent had been indorsed thereon, and, so believing, omitted to examine the same, but laid it away in his safe until after the loss occurred, something over a year thereafter; that he was led to believe that consent had been

indorsed upon the policy by the representations of the defendant's agent at Hopkins, Mo., that the general agents would undoubtedly do so. It was also alleged that proof of loss had been made, and all conditions complied with, on the part of plaintiff.

A demurrer was sustained to the complaint, and the plaintiff declined to amend, whereupon judgment was rendered against him.

The question for decision arises upon the ruling of the court upon the demurrer. Appellant's counsel insist that the assignment of the policy without the company's consent did not ipso facto operate a forfeiture, but, having received notice of the assignment, some act or declaration upon the part of the company was necessary to produce that result; and, having remained silent, the breach of condition was waived. It is argued that the word "void" should be construed as "voidable." In many instances after an insurance company has notice of the breach of a condition which, according to the terms of the policy, would result in a forfeiture, it must in some affirmative manner manifest its avoidance of the policy, or the condition will be taken as waived. *Association v. Beck*, 77 Ind. 206, 40 Am. Rep. 295; *Havens v. Insurance Co.*, 111 Ind. 90, 12 N. E. 137, 60 Am. Rep. 689; *Insurance Co. v. Marple*, 1 Ind. App. 411, 27 N. E. 633.

A void contract is incapable of being inspired with legal vitality except by some act equivalent in effect to a new execution. Hence it follows that the breach of any condition that can be waived renders the contract voidable only. But a different principle applies to the question involved in this appeal. Insurance policies are contracts of indemnity, and are essentially personal in their nature. They relate to the insured, rather than the subject-matter of insurance, and at common law were nonassignable. There is no statutory provision changing the common-law rule, but after a loss has occurred the policy becomes a chose in action, and is assignable as other choses in action are. Courts know, as a matter of general knowledge, that the character of the insured is taken into account, as affecting the moral hazard of a risk; and this is an additional reason why a change of indemnitee should not occur without consent of the indemnitor. An insured must have an interest in the subject of insurance, or the policy will be held a wager contract, and void as against public policy. Having obtained valid insurance, if the interest of the policy holder ceases in the property covered, the policy at once becomes inoperative. There is, then, no possibility of a loss; consequently, no basis for indemnity. The contract being one of indemnity, and personal to the insured, it follows that any assignment by him, with a transfer of the title to the property, transfers no right in the insurance to the assignee, without the consent of the insurer. Such consent is equivalent to the creation of a new contract between the assignee and the insurer, according to the terms of the policy assigned. It is not strictly an assignment, but the making of a new contract. *Insurance Co. v. Munns*, 120 Ind. 30, 22 N. E. 78, 5 L. R. A. 430.

This being the case, there never was any contract between the appellant and appellee, and consequently no conditions that could be waived. After the transfer of title, Pierson had no insurance, because he had nothing to insure. Hence, no right passed by the assignment of the policy. Appellant had no right to rely upon the suggestion of the first agent to whom he sent the policy that the general agents would indorse the company's consent to the transfer. Conditions may be waived by silence, under some circumstances, but it is rare that entirely new indemnity contracts may be created in that manner. Judgment affirmed.

KASE v. HARTFORD FIRE INS. CO.

(Supreme Court of New Jersey, 1895. 58 N. J. Law, 34, 32 Atl. 1057.)

Action by John H. Kase, for the use of Albert O. Headley, against the Hartford Fire Insurance Company. Judgment for defendant, and plaintiff brings error.

GUMMERE, J. This is an action brought by the plaintiff, for the benefit of Albert O. Headley, upon a policy of insurance issued by the defendant corporation. The principal facts in the case are undisputed, and briefly these: The Hartford Fire Insurance Company on the 8th day of May, 1890, issued to G. Schwab & Bros. a policy of insurance upon certain property in the city of Newark, which was covered by a mortgage held by John H. Kase, the plaintiff in this suit. The policy contained this clause: "Loss, if any, payable to John H. Kase, mortgagee, as interest may appear." It also contained the ordinary provision that the interest of the mortgagor, nor by any change in the ownership of the property. On the 10th day of November, 1891, Kase assigned to Headley the mortgage which covered the insured property, together with the bond which it was given to secure, but did not assign to him the policy of insurance, or his interest in it. Nor did the insurance company consent to the transfer to Headley, or agree that he should stand in the place of Kase, so far as the payment of any loss was concerned. A short time after the mortgage was assigned, and on the 28th of November of the same year, the mortgaged premises were partially destroyed by fire. Before this occurred, however, the policy of insurance had become invalidated, as against the owners of the premises, by reason of their violation of certain of its conditions, and had ceased to be an obligation of the company, so far as they were concerned. After the fire occurred, Kase delivered the policy of insurance to Headley, and then brought this suit, in his own name, for the use of Headley.

The question to be determined is whether such a suit can be main-

tained, and damages recovered from the company, by reason of the partial destruction by fire of the mortgaged premises, notwithstanding that at the time of the fire the policy had become invalidated, as against the owners of the premises, and that Kase, although he had assigned his mortgage to Headley before the fire occurred, failed to transfer to him his interest, as mortgagee, in the policy of insurance.

It seems clear that, in the condition of affairs above narrated, this action cannot be maintained. So far as Kase is concerned, he has not suffered any loss by reason of the injury to the mortgaged premises, for he had no interest in them when the fire occurred. So far as Headley, the assignee of the mortgage, is concerned, although it is true that the fire depreciated his mortgage security, and thereby inflicted pecuniary loss upon him, yet, as he had no interest in the policy of insurance at the time of the fire, he has no right to call upon the defendant company to make good the loss which he has sustained. A policy of insurance is a contract of indemnity, personal to the party to whom it is issued, or for whose interest the insurer undertakes to be responsible in case of loss, and cannot be transferred to a third person, so as to be valid in his hands against the insurer, without the insurer's consent. *Wilson v. Hill*, 3 Metc. (Mass.) 69; *Flanagan v. Insurance Co.*, 25 N. J. Law, 506; *Rayner v. Preston*, 18 Ch. Div. 1.

Not only was no such consent given in this case, but no attempt was made by the mortgagee to transfer to his assignee his interest in the policy of insurance until after the risk which it insured had determined. The judgment of the court below should be affirmed.

III. A Contract Essentially of Indemnity⁷

CHICKASAW COUNTY FARMERS' MUT. FIRE INS. CO. v. WELLER.

(Supreme Court of Iowa, 1896. 98 Iowa, 731, 68 N. W. 443.)

See post, p. 307, for a report of the case.

⁷ For a discussion of principles, see *Vance on Insurance*, § 28.

IV. The Nature of the Contract of Life Insurance^{*}

NYE v. GRAND LODGE A. O. U. W.

(Appellate Court of Indiana, 1894. 9 Ind. App. 131, 36 N. E. 429.)

Action by Nancy J. Nye against the Grand Lodge Ancient Order of United Workmen and Joseph H. Clark and others. Plaintiff's husband held a certificate of membership in the order for \$2,000. This he sold and assigned to Clark for \$300. Clark surrendered the certificate and procured the issuance of a new certificate naming himself as beneficiary. Before the death of plaintiff's husband Clark paid in dues and assessments to keep the certificate alive \$135. This action was brought by the widow of the insured to recover the amount due on the certificate. The defendant association interpleaded and paid the sum due into court. From a judgment awarding the fund to the defendant Clark, plaintiff appeals.

Lorz, J.⁹ * * * There is a marked conflict between the adjudicated cases bearing upon some of the propositions here involved. Owing to this conflict, the questions here presented are not free from difficulty. In considering them we may be materially aided by a brief recurrence to the origin and growth of the business of insurance and of the principles which underlie it. Nearly every kind of property is exposed to injury or destruction. Of those causes which produce disaster, the most common are fire, shipwreck, and premature death. A person in good health, in the full possession of all his faculties, has the power to earn and accumulate property. These future earnings may be of great value to those dependent upon him, or to his creditors. These earnings may be destroyed by his premature death. Life insurance has for its object the protection of these future earnings.

In the complexity of modern society, property may also be exposed to certain artificial losses, such as insolvencies, failure of title, and the like. The exposure of property to these various hazards may be very common, but loss actually occurs in comparatively few instances. It is difficult or impossible to predict or prevent the happening of the events which produce the loss, but it is frequently of the greatest moment to those most deeply concerned to guard against the loss which their occurrence entails. This end may be accomplished by means of a general fund obtained by imposing a small contribution upon the many who are exposed to the common peril, from which the few

^{*} For discussion of principles, see Vance on Insurance, § 29. See, also, Cooley, Briefs on the Law of Insurance, vol. 1, pp. 85-97.

⁹ Part of the opinion is omitted and the statement of facts is rewritten.

who actually suffer may be made whole. To secure this indemnity against loss gave rise to, and lies at the foundation of, the business of insurance.

As a business, it is the system of distributing losses upon the many who are exposed to the common hazard. Its importance has grown with the extension of trade and commerce and the necessities of civilized life. Marine underwriting lays claim to high antiquity. Traces of its existence are found under the early Roman emperors. It came into prominence among the Lombards of northern Italy during the revival of commerce in the twelfth and thirteenth centuries. The principles and methods of marine insurance were easily and readily extended to the hazards which surrounded like property upon land. The controlling principle in a contract of fire or marine insurance has ever been that of indemnity. The insurer contracts to indemnify the assured for what he may actually lose by the happening of the events upon which that insurer's liability is to arise. Under no circumstance is the assured, in theory, permitted to make a profit of his loss. If this were not so, the two parties to the contract would not have a common interest in the preservation of the thing insured, and the contract would create a desire for the happening of the event insured against. When the insured can only receive compensation for the loss which he may actually sustain, the temptation to defraud, and carelessness in exposing the property, are removed.

Life insurance, according to the authorities, is of later origin than fire and marine insurance, but the same general principles which underlie them govern life insurance. The indemnity feature in life insurance is not always apparent. Indeed, the great weight of authority is to the effect that the element of indemnity is not necessary to support a contract of life insurance. *Dalby v. Assurance Co.*, 15 C. B. 365; *Insurance Co. v. Bailey*, 13 Wall. 616, 20 L. Ed. 501; *Loomis v. Insurance Co.*, 6 Gray (Mass.) 396; *Lord v. Dall*, 12 Mass. 118, 7 Am. Dec. 38; *Insurance Co. v. Johnson*, 24 N. J. Law, 576.

In *Biddle on Insurance* (section 185) it is said that "it may be laid down as nearly the universal rule that at the present time, either by statute or judicial decision, an interest is necessary to support a life policy; and it may be asserted with the same universality that the courts have decided that a life policy is not a contract of indemnity." The interest which one has in his own life, or in the life of another, (unless it be a debtor,) is difficult to estimate in dollars and cents; hence it is said that strict indemnity finds no place in life insurance.

Mr. May, in his excellent work on *Insurance* (section 7), takes issue with the current authorities, and logically shows that there is no difference between valued policies in fire and marine insurance and a policy of life insurance. In each case the value of the interest is agreed upon in advance, and the purpose of the contract is to indemnify the insured to the extent of the agreed value. Life insurance has been defined to be a contract in which one party agrees to pay a

given sum upon the happening of a particular event contingent upon the duration of human life, in consideration of the immediate payment of a smaller sum, or certain equivalent periodical payments, by another. *Buny. Ins. 1; Dalby v. Assurance Co., supra.*

Life insurance and fire and marine insurance have much in common, and yet there are essential differences between it and them. In the latter, the loss may or may not occur, and, should it occur, it may be total or partial; while in the ordinary life insurance the event insured against is certain to occur, and the time of the happening is the only contingent element. The person for whose benefit the insurance is written, his heirs or assigns, is certain to realize the sum named in the contract. As the expectancy of life decreases, the value of the policy increases.

The reverse of this is true in fire and marine insurance. As the time for which the policy was written grows shorter, its value decreases. Insurance is sometimes spoken of as an aleatory contract, or one involving risk or speculation; and it certainly is a contract of mutual risk, wherein the premium is risked against the chance of loss. But it is not ordinarily a wagering or gambling contract. Although risk is of the essence of the contract, it exists before the contract is executed, and the assured is moved to effect the contract by reason of the existence of the risk, while in a purely wagering contract the risk is created by the contract itself. If the assured have no interest whatever in the thing or life insured, he sustains no risk. The thing or the life which may be the subject of insurance, it is true, is exposed to the hazard of loss; still the person who has no interest therein does not bear the risk. If one take out a policy of insurance upon the life of a person in whom he has no interest whatever, his risk is created by the contract itself, and it falls within the category of wagering or gambling contracts.

It has become a fixed rule in life insurance that the assured must have an interest of some kind in the life of the person insured in order to take the policy out of the category of wagering contracts. Another reason sometimes given for this rule is that it is against public policy, and has a demoralizing influence for one person to be interested in the death, rather than the life, of another. This latter reason is based upon the supposition that the temptation on the part of the assured to destroy the life of the insured must be counterbalanced by the existence of an insurable interest in the life of the insured.

This doctrine that the assured must have an interest in the life of the person insured is expressly condemned by Mr. Cook on Life Insurance (section 58). He characterizes it as a false, artificial, and confusing restriction as to the class of persons who may obtain the benefit; and concerning the last reason he says: "But the theory that it is contrary to public policy that one person should have an expectation of a benefit conditioned on the happening of the death of another finds little, if any, support from the rules applied to analogous

cases, for it is just this expectation that exists in case of a devise or legacy, or in case of dower or other life tenancies; yet it never seems to have been seriously suggested that, on that ground, devises, legacies, or life tenancies are invalid or contrary to public policy."

The view maintained by Mr. Cook is supported by the adjudication of Ireland, New Jersey, Rhode Island, and perhaps some other states. The rule adopted by the courts of England and of the United States generally, and by the supreme court of this state, is that the assured must have an insurable interest in the life of the person insured. *Insurance Co. v. Hazzard*, 41 Ind. 116, 13 Am. Rep. 313; *Insurance Co. v. Sefton*, 53 Ind. 380; *Insurance Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185. * * * Judgment affirmed.¹⁰

V. The Nature of Mutual Benefit Insurance ¹¹

DANIHHER v. GRAND LODGE A. O. U. W.

(Supreme Court of Utah, 1894. 10 Utah, 110, 37 Pac. 245.)

Action by Dennis Daniher against the Grand Lodge Ancient Order of United Workmen, Jurisdiction of Nevada, and all individual members of all lodges within said jurisdiction subordinate to and under the control of said Grand Lodge A. O. U. W. of Nevada.

BARTCH, J.¹² The plaintiff brought this action to recover \$2,000, the amount of a beneficiary certificate issued by the defendants to Jerry T. Daniher, who designated the plaintiff, his father, as his beneficiary, to whom payment should be made after his death. Jerry T. Daniher died November 18, 1888, and thereafter demand was made and payment refused. Upon the trial of the cause the court entered judgment in favor of the plaintiff, and thereupon the defendants appealed.

The first material question to be determined is whether there existed, between the deceased and the appellants, a contract of insurance, which includes the question whether the Ancient Order of United Workmen is in any sense to be classed as a mutual life in-

¹⁰ The court held that the assignment was valid, and not a mere wagering contract, and affirmed the judgment awarding the fund to the assignee.

For a discussion of the nature of life insurance contracts as contracts of indemnity when issued to secure a creditor, see *Exchange Bank v. Loh*, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372 (1898).

Assignment of life policies, see post, p. 301.

¹¹ For discussion of principles, see *Vance on Insurance*, § 30. See, also, *Cooley, Briefs on the Law of Insurance*, vol. 1, pp. 25-38.

¹² Part of the opinion is omitted.

surance company. It is shown by the record that the association is a voluntary, unincorporated, beneficial and benevolent society. Under its constitution and by-laws, it is designed to promote the welfare of its members, and protect those dependent upon them. One, if not its principal, object, is to provide for the payment of a stipulated sum to the beneficiaries of its deceased members. Its governing bodies consist of a supreme lodge, of grand lodges, and of subordinate lodges. It is the province of the supreme lodge to prescribe and determine the rights, privileges, and duties of the members of the society and of the beneficiaries of deceased members. Grand lodges are organized and exist under its authority, and subject to the constitution and general laws of the order, in such countries, states, territories, and districts as the supreme lodge may determine. A grand lodge has original jurisdiction, within its territory, over all matters pertaining to the welfare of the order, and, for the government of itself and its subordinate lodges, may adopt constitutions, by-laws, rules, and regulations, and may alter and amend the same. It exercises control and supervision over the subordinate lodges within its jurisdiction. The defendant grand lodge, jurisdiction of Nevada, has control over and supervision of all the subordinate lodges in the states of Nevada, Idaho, Wyoming, Montana, and in the territory of Utah.

Under the constitution and by-laws of the order, there is established a beneficiary fund for the benefit of all members in good standing, and each member who complies with the rules and regulations of the order is entitled to a benefit certificate in the sum of \$2,000, payable, at the death of the member, to the person designated by him as his beneficiary. These certificates are issued by virtue of the power vested in the grand lodge, in the nature of mutual benefit insurance, of which the members of the order may avail themselves. The beneficiary fund is maintained by assessments upon the individual members. Under the rules and by-laws of the lodge, all assessments are dated on the 1st day of the month, and the sum of one dollar is levied upon each member for each death which occurred during the preceding month. Notice of assessments must be served personally or by mail, on or before the 8th day of the month in which the assessments were made. Then it is incumbent upon each member to pay the same on or before the 28th day of the month, and, if he fails to do so, he shall stand suspended from all the rights, benefits, and privileges of the order. Any member thus suspended may be reinstated at any time within 30 days from the date of suspension by paying all assessments then remaining unpaid, and, after 30 days, but within 3 months, by paying all assessments in arrear and pending, and furnishing a certificate of good health. Any suspended member, after the expiration of three months from the date of his suspension, can only be reinstated upon examination and recommendation of the medical examiner, as in the original instance, and at the expiration of six

months from the date of his suspension his beneficiary certificate shall be annulled. * * *

Thus, from an examination of the record, it is clear that the order has assumed the characteristics of a fraternal organization, but it is also equally clear that it has embodied within its constitution and by-laws many of the incidents of a mutual life insurance company, and these apparently predominate. The controlling object of the order seems to be the providing a beneficiary fund, out of which a certain stipulated sum is to be paid to the beneficiary of each member in good standing, upon the happening of a contingency. Good health is a requisite to become a member, and every application for membership must be accompanied by a physician's certificate to that effect. That an applicant is insurable is one of the qualifications for admission, and when he is admitted into full membership a certificate in the nature of an insurance policy is issued to him, and he cannot maintain his membership without keeping such certificate in force by the payment of his assessments and dues. The assessments are, in their nature, premiums, the nonpayment of which works a forfeiture of the insurance.

Very ample and exacting provisions are contained in the constitution and by-laws in relation to the beneficiary fund, to enforce payment of assessments upon the death of a member, while the other declared objects of the association seem to be almost without provision for enforcement. It is evident from these provisions and requirements that the main object of the order is protection to the beneficiaries of its deceased members by insurance, and that its fraternal charter is merely incidental. The contract made between this association and each of its members by issuing a beneficiary certificate, as shown by the record in this case, does not essentially differ from an ordinary contract of mutual life insurance. The life of the member is the subject insured, and the risk is death. The sum to be paid is certain, and so also are the assessments to be paid during the continuance of the risk. There is an absolute undertaking to pay the beneficiary designated, upon the happening of the contingency, unless forfeiture has resulted by nonpayment of dues or assessments. The conclusion is inevitable that it is an insurance contract, and that the association is, in effect, a mutual life insurance company. The rights of the parties to this suit must therefore be determined by the law applicable to mutual life insurance corporations. *Bac. Ben. Soc.* § 52; *State v. Miller*, 66 Iowa, 26, 23 N. W. 241; *Commonwealth v. Wetherbee*, 105 Mass. 149; *State v. Bankers' & M. Mut. Ben. Ass'n*, 23 Kan. 499; *McCorkle v. Association*, 71 Tex. 149, 8 S. W. 516. * * * Judgment affirmed.

VI. The Contract of Reinsurance¹³

Appeal of GOODRICH.

(Supreme Court of Pennsylvania, 1885. 109 Pa. 523, 2 Atl. 209.)

On January 31, 1876, a petition was presented by the insurance commissioner to wind up the Penn Fire Insurance Company, for being fraudulently conducted and insolvent. Proceedings were suspended to allow it to execute a contract with La Caisse Generale des Assurances Agricole et des Assurances contre l'Incendie, whereby it was agreed that in consideration of \$10,000, the receipt of which was acknowledged, "a policy of insurance is to be issued by La Caisse Generale," etc., "reinsuring the outstanding risks of the said Penn Fire Insurance Co.;" the amount over and above \$10,000 necessary to reinsure its outstanding risks to be paid on or before 60 days. In a more formal contract made a day or two later, it was also agreed that "the policy of reinsurance to be issued to the Penn Fire Insurance Company shall be on the following conditions, viz.:" That the reinsurance should extend to 40 days; and if then a certain portion of the balance of the premiums should not be paid, the liability of the Caisse Generale should cease; that the Penn Company will turn over all books, reports, registers, etc.; and that the Caisse Generale will assume the care of the adjustment of all losses which may occur under the policies of the said Penn Company, which are thereby to be reinsured. Within the 40 days the steamer Mary Bell, owned by Ralph Hicks, Richard Sinnot, and Alfred Grissom, Jr., and property belonging to Henry C. Goodrich and William B. Nevins, trading as Goodrich & Nevins, was totally destroyed by fire. The Caisse Generale paid the amount of the losses which occurred during the 40 days on suit by receiver of the Penn Company. This fund is claimed by the owners above, the appellants, and also by the general creditors of the Penn Company. The auditor reported in favor of the general creditors. Complainants excepted to the report, but it was confirmed by the court, whereupon this appeal was taken.

CLARK, J.¹⁴ The only question raised by the several assignments of error in this case is whether or not, in the distribution of the assets of the Penn Fire Insurance Company of Philadelphia in the hands of an assignee, the appellants are entitled to any preference over the general creditors of the company. * * *

¹³ For discussion of principles, see Vance on Insurance, § 31. See, also, Cooley, Briefs on the Law of Insurance, vol. 4, p. 3932 et seq.

¹⁴ Part of the opinion is omitted.

"Reinsurance" is properly applied to an insurance effected by one underwriter with another, the latter wholly or partially indemnifying the former against the risks which he has assumed; that is to say, after an insurance has been effected the insurer may have the subject of insurance reinsured to him by some other. There is in such case, however, no privity between the original insured and the reinsurer; the latter is in no respect liable to the former as a surety or otherwise; the contract of insurance and of reinsurance being totally distinct and disconnected. But while the contract is one of indemnity simply, in which the insurer is to be protected to the extent of his loss, when the loss is incurred and ascertained, the reinsurer must pay the amount. The insurer may at once, without payment to the original assured, resort to his action. *Fame Ins. Co.'s Appeal*, 83 Pa. 396. Even if the insurer fail, or become insolvent, so that his insured receives only a dividend, however small, the reinsurer can gain nothing by this, but must pay the amount of the loss to the first insurer. *Hastie v. De Peyster*, 3 Caines (N. Y.) 190; *Hone v. Mutual Safety Ins. Co.*, 1 Sandf. (N. Y.) 137, affirmed in court of appeals sub nom. *Mutual Safety Co. v. Hone*, 2 N. Y. 235; 3 Kent, Comm. 279; *Marsh. Ins.* 143. So, in *Herckenrath v. American Ins. Co.*, 3 Barb. Ch. (N. Y.) 63, Chancellor Walworth decided that "where an insurance company has underwritten a policy, and afterwards causes itself to be reinsured, and after the loss of the property insured such company becomes insolvent, the person originally insured has no equitable lien upon the sum of money due on the contract of reinsurance; but that fund belongs to all the creditors of the insolvent company ratably."

These are familiar principles of insurance law, and are not now anywhere doubted. If, therefore, the contract between *La Caisse Generale*, etc., and the *Penn Fire Insurance Company* was for a policy of reinsurance, properly so called, the appellants could have no preferable claim or lien upon the fund in question although the *Penn Company* was admittedly and hopelessly insolvent.

It is contended, however, by the appellants that the contract in question, when read in the light of the facts attending its execution, cannot, in any strict sense, be considered a contract for reinsurance; that it was not intended to provide indemnity to the company, but to the individual policy holders, and that the policy holders can claim the advantage of this so-called reinsurance for themselves directly and exclusively; that the term "reinsurance" was not used in its legal or technical sense, but in a different sense, defined by the particular facts which induced the creation of the contract, and that the reinsurance by the *Caisse Generale*, etc., was in fact, although not so expressed, a conditional assumption of the business of the *Penn Company*.

It was competent, we think, for the *Penn Company*, acting in the interest of its general policy holders, with or without authority, in view of insolvency, and without fraud, to effect an indemnity for their individual protection in case of loss (*Glen v. Hope Mut. Ins. Co.*, 56 N.

Y. 379; *Fischer v. Same*, 69 N. Y. 161), which, even after loss, they might ratify and approve (*Flemming v. Marine Ins. Co.*, 4 Whart. 59, 33 Am. Dec. 33; *Stillwell v. Staples*, 19 N. Y. 405; 1 Am. Lead. Cas. 344); and if the insurance was in their interest, directly for their benefit, and free from any additional burden or obligation on their part, ratification might be presumed. But we fail to find anything in the words of the contract, in the special circumstances attending its creation, in the nature of the transaction itself, or in any rule of public policy, that would justify us in saying that the contract was any other than a contract of reinsurance, in the proper sense of that term. The contract was written by and between persons on both sides actually engaged in the business of insurance—persons conversant, doubtless, with the meaning of terms employed in the practice of insurance—and the presumption is a fair and reasonable one that words of technical or special import were by them properly applied. The words “reinsure” and “reinsurance” would therefore seem, in the first instance at least, to characterize the contract, and to point out the object and purpose of the parties. The proper signification of these terms would, of course, vary with the clearly manifested intention of the parties. But the contract is with the Penn Company, for a consideration moving from it, providing for a policy to the Penn Company to reinsure its risks. There is no provision whatever expressed in the contract for the individual indemnity of the policy holders, nor for the insurance of their property for them. The reinsurance is expressly upon the “outstanding risks” of the company. The contract of reinsurance, in some sense, perhaps, operates upon the property itself rather than the risk, but the fact that the policy was to be upon the “risks” indicates that it was the company’s insurable interests in the property which formed the basis of the insurance.

It is true that, except for the appellants’ losses by fire, the fund of \$6,000 would not have been realized, but this is incident to all cases of reinsurance. It is true, also, that the reinsurance was of all the outstanding risks of the company, and not, as is usually the case, of any particular part of them; but whether a company shall reinsure the whole, or only a part, of its risks is a question of policy for the company, dependent upon its purposes for the future or its circumstances. If the underwriter wishes to change his business, or to quit the country, or to avert insolvency, he may choose to reinsure the whole. Under different circumstances he may choose to indemnify himself as to part only. The provision that the Penn Company “will turn over to the Caisse Generale its original registers, books, reports, and other papers in any way relating to the policies thereby insured,” and “that the Caisse Generale will assume the care and expense of the adjustment of all losses which may occur under the policies of the said Penn Fire Insurance Company, which are thereby to be reinsured,” are consistent, we think, with either theory of the case—as consistent with one as with the other—and they, therefore, prove nothing either way. Such

a course of proceeding may be rare, but cases are rare, perhaps, when the reinsurance is upon the whole list of the underwriter's risks, and where this is the case there can certainly be nothing unreasonable in the provision. We think there is nothing on the face of the contract itself to give it the effect claimed for it, and we can discover nothing in the facts which led up to its execution which would evidence any intention of the parties different from what is plainly expressed.

* * *

The case of *Glen v. Hope Mut. Ins. Co.*, supra, is greatly relied on by the appellants, but that case is materially different from this. By a contract duly executed, the Hope agreed to reinsure the Craftsman Company on all risks for which its policies were outstanding, and also to assume all such policies, and to pay the holders thereof all such sums as the Craftsman might, by force of such policies, become liable to pay. The engagement to the policy holders was direct and express, and the liability was therefore direct and exclusive. This case was followed by *Fischer v. Hope Mut. Ins. Co.*, supra, which was another action on the same contract, and the rulings in the former case were in the latter recognized and approved.

The decree of the court of common pleas is affirmed, and the appeal is dismissed at the costs of the appellant.¹⁵

JOHANNES v. PHOENIX INS. CO. OF BROOKLYN, N. Y.

(Supreme Court of Wisconsin, 1886. 66 Wls. 50, 27 N. W. 414, 57 Am. St. Rep. 249.)

This is an appeal from an order overruling a demurrer to the complaint for insufficiency, as against the appellant. The complaint alleges that July 1, 1883, the defendant the Standard Fire Office of London, Limited, insured the plaintiff's property against loss or damage by fire to the amount of \$1,650 from July 1, 1883, to July 1, 1886. And the plaintiff further alleges that subsequent to the making and issuing of said policy the defendant the Phoenix Insurance Company being desirous of acquiring and purchasing the business and good will of its co-defendant herein, and the defendant the Standard Fire Office of London, Limited, aforesaid, being desirous of reinsuring its risks upon property in the United States, and having withdrawn from business in the United States, the said defendant corporation, on or about the 2d day of January, 1884, made and entered into an agreement in writing, whereby the Phoenix Insurance Company, aforesaid, reinsured all the risks of the Standard Fire Office upon property situated in the United States from 12 o'clock noon, in New York, on the 1st day of January, A. D. 1884, and agreed that all losses arising under the policies

¹⁵ Compare *Barnes v. Hekla Fire Ins. Co.*, 56 Minn. 38, 57 N. W. 314, 45 Am. St. Rep. 438 (1893).

of the Standard Fire Office upon property situated in the United States should, after that time, be borne by the said Phoenix Insurance Company, and should be paid, satisfied, and discharged by it, and thereby reinsured the risk upon the property mentioned in the policy hereinbefore described, and agreed that the loss of this plaintiff arising thereunder should be borne, paid, satisfied, and discharged by said Phoenix Insurance Company, which thereupon became owner of the good will, original documents, and books of its codefendant herein, relating to the risks aforesaid, and assumed control of the same, and of the business pertaining to said risks, policies, and losses. The complaint further alleges, in effect, that July 4, 1884, and while said policy was still in force, the assured property was destroyed and lost by fire, etc.
* * *

CASSODAY, J.¹⁶ A policy of fire insurance is a contract of indemnity. *Darrell v. Tibbitts*, 5 Q. B. Div. 560. By such contract the insurer agrees to compensate the assured for loss by fire of certain property, for a given time. The existence of such contract gives the insurer an insurable interest in the property insured, coextensive with its liability. *Delaware Ins. Co. v. Quaker City Ins. Co.*, 3 Grant, Cas. (Pa.) 71; *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. (N. Y.) 359. Here the Standard Fire Office of London insured the plaintiff's property for three years from July 1, 1883. After doing so it became desirous of reinsuring its risks upon property in the United States, and withdrawing from business in the United States. The Phoenix Insurance Company of Brooklyn was at the same time desirous of acquiring and purchasing the business and good will of the Standard Company. Accordingly the two companies made the agreement set forth in the statement of facts, on January 2, 1884. At that time the plaintiff's policy had two years and a half more to run. Of course the Standard Company had an insurable interest in the plaintiff's property commensurate with its liability. The agreement between the two companies, as alleged, was based upon a sufficient consideration. Its validity is not assailed. The contention is that the contract between the two companies is confined strictly to them, and that the plaintiff under his policy issued by the Standard has no privity in the contract made by the Phoenix, and can maintain no action thereon against the Phoenix. In other words, that it was strictly a contract of reinsurance by the Standard Company, solely for its own benefit, and not for the benefit of any of its then existing policy holders in the United States.

In support of such contention the learned counsel for the appellant cites several cases. * * * Some of the cases cited were upon contracts of strict reinsurance, as above defined, and clearly sustain the position of counsel, if the contract here is to be so restricted. *Hastie v. De Peyster*, 3 Caines (N. Y.) 190; *Herckenrath v. American M.*

¹⁶ Part of the opinion is omitted and the statement of facts is rewritten.

Ins. Co., 3 Barb. Ch. (N. Y.) 63; New York Bowery Fire Ins. Co. v. New York Fire Ins. Co., *supra*; Hone v. Mutual Safety Ins. Co., 1 Sandf. (N. Y.) 137; s. c., 2 N. Y. 235; Carrington v. Commercial F. & M. Ins. Co., 1 Bosw. (N. Y.) 152; Blackstone v. Alemannia Fire Ins. Co., 56 N. Y. 104; Strong v. Phoenix Ins. Co., 62 Mo. 289, 21 Am. Rep. 417; Gantt v. American Cent. Ins. Co., 68 Mo. 503; Delaware Ins. Co. v. Quaker City Ins. Co., *supra*.

Thus, in Hone v. Mutual Safety Ins. Co., *supra*, the defendant, by the policy of reinsurance, "promised and agreed to make good to the American Mutual Insurance Company all such loss or damage," etc. So, in the case cited in Bosworth the agreement was to "reinsure the American Mutual Insurance Company of Amsterdam upon the following policies issued by them, loss, if any, payable to the assured upon the same terms and conditions, and at the same time, as are contained in the original policies." A description of the several policies is then given. The court, at general term, said: "If the word 'assured,' as used in this contract, means the party reassured, the present plaintiffs have no interest in the contract, and no right to maintain an action upon it; * * *" but "if the word 'assured' does not mean the party 'reinsured,' and that party only, then it includes and embraces, not only the plaintiffs, but also nineteen other individuals and firms. By the contract of reinsurance the defendants took upon themselves the risks which the corporation reinsured had incurred by insuring twenty separate and distinct policies." The court then determined that the word "assured," as used, meant the company issuing the original policies and obtaining the reinsurance, and not any of such policy holders. In Blackstone v. Insurance Co., *supra*, the agreement was simply to reinsure the company, and the principal contention was whether the insurance was double under the peculiar wording of the policy. The same is true of Owens v. Sturges, 67 Ill. 366, and Insurance Co. v. Insurance Co., 38 Ohio St. 11, 43 Am. Rep. 413, cited.

But in the case before us the contract between the defendant companies was, as it seems to us, something more than a mere reinsurance. By that contract the Standard Company sold and turned over to the Phoenix its entire business, and the good will of that business, in the United States, together with a large amount of bonds and other property, in consideration of which the Phoenix thereby "reinsured all the risks" of the Standard Company "upon property situated in the United States, * * *" and agreed that all losses arising under the policies of the said defendant the Standard Fire Office, Limited, upon property situated in the United States of America, should after that time (January 1, 1884) be borne by the said Phoenix Insurance Company, and should be paid, satisfied, and discharged by it, * * * and agreed that the loss of this plaintiff arising thereunder should be borne, paid, satisfied, and discharged by said Phoenix Insurance Company; which thereupon became owner of the good will, original documents, and books of its codefendant herein [the Standard Company] relating to

the risks aforesaid, and assumed control of the same, and of the business pertaining to said risks, policies, and losses."

Such are the alleged terms of the contract we are required to construe. The losses thus arising under the policies could only "be borne, paid, satisfied, and discharged" by the Phoenix in a direct transaction with the policy holders. Even a payment by it of the amount of the loss to the Standard Company would not satisfy or discharge the plaintiff's claim for such loss on his policy. That could only be done on payment to the plaintiff. It seems to us that by the terms of the contract, as alleged, the Phoenix, in effect, thereby assumed the risk covered by each policy, and agreed to pay any loss arising under each policy. The mere fact that the plaintiff was not named in the contract does not preclude him from maintaining an action upon the contract.

* * * In *Glen v. Hope Mut. Life Ins. Co.*, 1 *Thomp. & C.* (N. Y.) 463, affirmed 56 N. Y. 379, the defendant had agreed with the Craftsmen's Assurance Company to reinsure the latter company on all its risks "for which policies of the said party of the second part [Craftsmen's Assurance Company] are outstanding at this date, and hereby agree to assure all such policies, and to pay the holders thereof all such sums as the party of the second part may, by force of such policies, become liable to pay, * * * the liability for death losses to be limited to such deaths as may occur on and after this date;" and it was held that the defendant was liable on the contract of reinsurance directly to the several holders of policies for the whole amount insured thereby. The same doctrine, upon the same reinsurance contract, was reaffirmed in *Fischer v. Hope Mut. Life Ins. Co.*, 40 N. Y. Super. Ct. 291, affirmed 69 N. Y. 161. It seems to us that the contract of reinsurance in those two cases was substantially like the one at bar. Those actions in favor of such policy holders, upon such contract of reinsurance, were sustained upon the authority of *Lawrence v. Fox*, 20 N. Y. 268, and similar cases. That case has been expressly followed by this court. *Gray v. McDonald*, 19 *Wis.* 217. The same principle has frequently been reiterated by this court. *Putney v. Farnham*, 27 *Wis.* 187, 9 *Am. Rep.* 459; *McDowell v. Laev*, 35 *Wis.* 171; *Bassett v. Hughes*, 43 *Wis.* 319; *Kollock v. Parcher*, 52 *Wis.* 399, 9 *N. W.* 67; *Hoile v. Bailey*, 58 *Wis.* 450-452, 17 *N. W.* 322; *Town of Platteville v. Hooper*, 63 *Wis.* 383, 23 *N. W.* 581.

The principle thus sanctioned in these cases is to the effect that if, on the receipt of a good and sufficient consideration, A. agrees with B. to assume and pay a debt of the latter to C., then C. may maintain an action directly upon such contract against A., notwithstanding C. is not privy to the consideration received by A. We think the case at bar comes within the principle.

The order of the circuit court is affirmed.¹⁷

¹⁷ For a collection of authorities respecting the right of a third person for whose benefit a contract is made to maintain action thereon, see *Winninghoff v. Wittig*, 64 *Wis.* 180, 24 *N. W.* 912 (1885).

LONDON ASSUR. CORP. v. THOMPSON.

(Court of Appeals of New York, 1902. 170 N. Y. 94, 62 N. E. 1066.)

Action by the London Assurance Corporation against Joseph W. Thompson. From a judgment of the appellate division (54 App. Div. 637, 67 N. Y. Supp. 1138) affirming a judgment for defendant on report of a referee, plaintiff appeals.

VANN, J.¹⁸ This is a controversy between insurers, which turns upon the construction of a policy of reinsurance. The plaintiff is a foreign insurance corporation, and the defendant is one of several individual underwriters, who issue what are known as "Lloyd's policies," and do business under the name of the New Jersey State Fire Association. The policy of the plaintiff, issued to Patterson, Downing & Co., covered "all risks by railroads and/or other inland conveyances, and in warehouses, yards, or elsewhere, from the time bills of lading are signed for the goods until the same shall have been laden on board vessels or lighter at such ports for shipment; on rosin, turpentine, and other goods commonly known as 'naval stores.' * * * This policy also to cover goods as herein described, the property of the Downing Co., or in which said company may be interested as owner or agent." There was also a marine risk, which is not here important.

The policy of the defendant was of the New York standard form, whereby the underwriters agreed to "*reinsure the London Assurance Corporation* * * * against all direct loss or damage by fire * * * to the following described property while located and contained as described herein and not elsewhere, to wit, on the fire risk on naval stores, i. e., rosin, turpentine, etc., in barrels, while waiting shipment, in or on the warehouses, and/or sheds of *Downing & Co. at Brunswick, Georgia*, and insured under policies issued by the London Assurance Corporation, marine branch. The same being naval stores of other parties intended for foreign or domestic shipment for which the London Assurance Corporation is liable under the terms of its marine policies issued to shippers. It is the true intent and meaning of this policy to fully indemnify the London Assurance Corporation for each and every loss by fire, within the limits above named, to the full extent of its interests as herein described, * * * in consideration of which, and the indemnity hereby guaranteed, the London Assurance Corporation hereby covenants and agrees to report to this association at the end of each month the total amount of insurance on naval stores that has been written by said corporation *in the abovesaid warehouses, &c.*, and to pay to this association its proportion of a premium at and after the rate of five cents for every one hundred dollars so insured. This policy is subject to the same fire risks, con-

¹⁸ Part of this opinion and all of the dissenting opinion of Haight, J., are omitted.

ditions, interpretations, valuations, indorsements, and assignments as are or may be assumed or adopted by the London Assurance Corporation, and loss, if any, payable at the same time and in the same manner as they pay. * * * This policy shall continue to protect all merchandise already accepted by the London Assurance Corporation, or for which they may be liable, until the same has passed beyond the limits of this policy."

Of the part thus quoted from the policy the words in italics are in manuscript, and, with this exception, all before the words "to wit" is part of the printed form, and all after is typewritten. The italicized words, "in the above-described warehouse, &c.," are interlined in manuscript in the typewritten part.

After a loss had occurred, the plaintiff paid Patterson, Downing & Co. the amount called for by their policy, and then brought this action to recover from the defendant his proportion thereof, according to the contract of reinsurance, without making any effort to reform it. The defendant, however, by a counterclaim, sought to reform it in his interest, but was defeated, and the attempt is now immaterial.

The referee adopted the short form of decision, but found specifically that "a typewritten paper purporting to set forth the terms upon which said reinsurance was made was prepared by the plaintiff, and furnished to the said New Jersey State Fire Association, and is attached to and forms part of the said policy of reinsurance; that said reinsurance is thereby declared to be" (quoting the part above set forth, describing the risk.) The referee further found that "a fire occurred at said yards of Downing & Co., in Brunswick, by which a large quantity of turpentine and rosin covered by the policy issued by the plaintiff to said Patterson, Downing & Co. was destroyed. * * * None of the rosin which was destroyed or damaged by said fire was in or on the warehouses, and/or sheds of Downing & Co., at Brunswick, but the whole thereof was deposited or stored, while waiting shipment, in the open yard of Downing & Co." He held that the rosin was not covered by the policy of reinsurance, and gave judgment for the loss on the turpentine only.

It appeared from the evidence that the yard of Downing & Co. was 540 feet long by 190 feet wide, and was bounded on the east by the tracks of a railroad, and on the west by navigable water connected with the Atlantic Ocean. In the center of the yard was a shed 300 feet long by 50 feet wide, and contiguous thereto a storehouse of the same width, and 100 feet in length. The plaintiff claims that, as the contract was one of reinsurance, it was an insurance of the plaintiff's identical risk, and that the intention was that the reinsurance should cover the plaintiff's terminal risk, whatever it was, and that the words "in or on the warehouses and/or sheds" should yield to an intention springing conclusively from the fact that the plaintiff's undertaking was to reinsure.

While the insurable interest of the plaintiff depended upon the policy issued by it to Patterson, Downing & Co., it does not follow that the contract of reinsurance covered all the risks thus assumed, for the policy was valid if it covered only a part thereof. Thus, while the policy issued by the plaintiff covered three general risks,—inland, terminal, and marine,—the policy issued to it related to only one risk, which was the terminal. It was not essential that the contract of reinsurance should cover even the entire terminal risk assumed by the plaintiff, for it was within the power of the parties to agree that it should cover a part of that risk only, and to limit it to the property in question while it was in a certain place at the terminal port. "When the insurer for some reason finds it convenient that another shall bear, either in whole or in part, the liability to the insured which he has assumed, and agrees with another insurer to assume the whole or a part of his liability as regards the insured, it is termed a 'contract of reinsurance.'" 1 Bid. Ins. § 378; Insurance Co. of North America v. Hibernia Ins. Co., 140 U. S. 565, 11 Sup. Ct. 909, 35 L. Ed. 517.

While a contract of reinsurance implies the same subject-matter of insurance as the original policy, and runs against perils of the same kind, it need not be for the identical hazard insured against in the first policy, but may be for a less, though not for a greater, risk. Philadelphia Ins. Co. v. Washington Ins. Co., 23 Pa. 250, 253; 1 May, Ins. §§ 9, 11. In a case relied upon by the plaintiff, one company reinsured another company on "their interest as insured under their policy" issued to the owner of the property, and hence both policies necessarily covered the same risk by express description. Jackson v. Insurance Co., 99 N. Y. 124, 1 N. E. 539. Reinsurance, like any other contract, depends upon the intention of the parties, to be gathered from the words used, taking into account, when the meaning is doubtful, the surrounding circumstances. * * *

The general rule is that, as insurance policies are unilateral contracts prepared by the insurers, they are responsible for any ambiguity arising out of the language used by them, and hence, in construing that language, all doubt is resolved against them, because they created it. Kratzenstein v. Assurance Co., 116 N. Y. 54, 22 N. E. 221, 5 L. R. A. 799. Ordinarily an ambiguity in the policy as to whether the rosin was covered, although it was not in the sheds or warehouses, but in the yard adjacent thereto, would be determined against the insurer, by applying the rule already referred to. This case, however, is peculiar, in that the words of the policy describing the risk were those of the insured, and not of the insurer; for, as the referee found, the former presented a typewritten slip to the latter, and asked for reinsurance according to the terms therein stated, and the defendant, without seeing the policies issued by the plaintiff, issued the policy in suit to the plaintiff, using the exact language which it had itself prepared.

During the negotiations which led to the policy under consideration there was no discussion as to the nature or extent of the risk,

which was treated by both parties as accurately described in the type-written slip subsequently attached to the policy as a part thereof. There was discussion in relation to the premium to be charged and other matters, but none as to the risk to be assumed; and the defendant had no means of knowing, if such was the fact, that the plaintiff wished to have any risk covered, other than that described in the slip. The risk thus described by the plaintiff was against loss or damage by fire to naval stores "while located and contained as described herein, and not elsewhere." The next clause is definite and specific, for it limits the risk to "rosin, turpentine, etc., in barrels, while waiting shipment, in or on the warehouses and/or sheds of Downing & Co.," and insured under policies issued by the plaintiff. "Within the limits above named," reinsurance was made "to the full extent of" the interests of the plaintiff, "as herein described." Finally a monthly report was required from the plaintiff of the total amount of insurance written by it on naval stores "in the above-described warehouses, &c."; the latter part, as if to avoid all possible doubt, having been interlined by the plaintiff with a pen.

The risk did not cover all rosin belonging to Patterson, Downing & Co., nor all insured by the plaintiff, but was confined to rosin while stored in a certain manner and in a certain place. No rosin was covered unless it was "in or on the warehouses and/or sheds of Downing & Co." These words in an application for insurance would ordinarily constitute a warranty that the property insured was thus situated, and would prevent a recovery for the loss of any situated elsewhere. *Bryce v. Insurance Co.*, 55 N. Y. 240, 14 Am. Rep. 249. While the original policy embraced "all risks by railroads and/or other inland conveyances, and in warehouses, yards or elsewhere," the policy of reinsurance makes no mention of property in yards, or in any place except warehouses and sheds. Therefore, unless the rosin destroyed was in or on the warehouses or sheds, it was not covered. The referee found that it was not so located, but he also found that it was deposited in the open yard, so that the unanimous affirmance does not make the former finding conclusive, because the latter presents a question of law as to the meaning of the policy. Clearly the property was in neither of the places named in the policy of reinsurance, for it was in a large, uncovered inclosure surrounding the warehouses and sheds, and known as the "yards."

While the meaning of the word "in," as used in the reinsurance contract, is free from doubt, that of the word "on" is not clear. The function which the parties intended it to perform is uncertain. It does not appear in the sentence requiring a monthly report of insurance written by the plaintiff, for that is limited to the naval stores "in the above-described warehouses, &c." This is significant, for both policies were open, on a fluctuating stock, and the quantity on hand, not exceeding \$80,000 in value, was the measure of the defendant's liability. Why should the report be limited to stock in the warehouses,

if the defendant was also liable for stock in the yards? The parties may have meant that the barrels of rosin were to be on the inside floors or the outside platforms of the buildings, or that they were to be near or about the buildings. * * * The plaintiff may have understood it in one way, and the defendant in another, without doing violence to reason. In other words, an ambiguity has arisen as to the meaning of the policy, which the courts must settle.

As the terms of insurance, including the description of the risk, were wholly prepared by the plaintiff, an insurer of wide experience—for it has done business since 1720—and the defendant had no information upon the subject, except the typewritten slip furnished by the plaintiff, we think that the responsibility for the ambiguity should be borne by the party who caused it. *Janneck v. Insurance Co.*, 162 N. Y. 574, 57 N. E. 182; *Herrman v. Insurance Co.*, 81 N. Y. 184, 37 Am. Rep. 488; *Kratzenstein v. Assurance Co.*, *supra*. While the defendant adopted the plaintiff's words when he pasted the slip in the policy, he could not do otherwise if he made any contract whatever. They were still the words of the plaintiff, the doubt caused thereby was caused by the plaintiff, and the defendant should not be required to father its offspring. The principle of resolving doubts in a unilateral contract by throwing the burden upon the one who caused them applies with the same force to this case, under its peculiar circumstances, as to the cases cited, and, as we think, furnishes the proper solution of the controversy.

The judgment should be affirmed, with costs.

VII. When the Contract Is Divisible¹⁹

SOUTHERN FIRE INS. CO. v. KNIGHT.

(Supreme Court of Georgia, 1900. 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216.)

COBB, J.²⁰ M. A. & L. L. Knight brought suit against the Southern Fire Insurance Company upon a policy of fire insurance. The case came on for trial, and at the conclusion of the testimony for the plaintiffs the defendant made a motion for a nonsuit, which the court overruled. The case proceeded to trial, and resulted in a verdict for the plaintiffs. The defendant brings the case here upon a bill of ex-

¹⁹ For discussion of principles, see Vance on Insurance, § 32. See, also, Cooley, Briefs on the Law of Insurance, vol. 2, p. 1894 et seq.

²⁰ Part of the opinion is omitted.

ceptions assigning error upon the refusal of the court to grant a nonsuit. * * *

The policy sued on in the present case insured both the stock of goods and the building in which it was contained. The premium due upon the policy was a gross sum. The question arises, therefore, whether the breach of a warranty relating solely to the goods, and which precludes a recovery for this loss, would also bar a recovery for the loss of the building. The stipulation prescribing that the insured must take an inventory of his stock provides that in case of failure so to do "this policy shall be null and void." What was the intention of the parties with respect to the question just above stated? If this intention is to be derived from the language used, and it must be, it would seem to be clear that the contract was entire and indivisible, and that the breach of a condition which would work a forfeiture would avoid the entire policy, and not simply a portion thereof. The parties contracted that "the policy" should be void in case of failure to comply with the iron-safe clause. The policy embraces insurance upon both the building and its contents, and the premium is payable in a gross sum. "If the consideration to be paid is single and entire, the contract must be held to be entire, although the subject of the contract may consist of several distinct and wholly independent items." 2 Pars. Cont. *519. It was competent for the parties to make two separate and distinct contracts, one covering the goods, and the other the building, but they did not see proper to do this. They combined the two, and made the consideration moving towards the insurer a gross sum. They further provided that the contract, not a part of it, should be void under certain conditions. It may perhaps seem to be unreasonable that, simply for a failure to take an inventory of the stock of goods, the plaintiffs should be precluded from recovering the value of the building. But this does not affect the question. The question is, what have they agreed upon? If there was any room to doubt as to the intention of the parties, that construction which is most reasonable and most consonant with justice would be applied. But there is none. The parties have deliberately chosen to enter into an agreement whereby the policy shall be forfeited if the insured fails to do certain things, and he has failed to comply with his agreement. In such a case there is but one thing for the courts to do, and that is to enforce the agreement as made.

The question as to whether a policy of insurance such as is involved in the present case constitutes a separable or an entire contract is no new question. It has been the subject of numerous decisions by the courts in this country, and they are in hopeless and irreconcilable conflict. The weight of authority is to the effect that the contract is entire, and that the breach of a warranty which relates solely to one class of property will avoid the entire policy, if the contract so provides. Text writers of great learning and ability have, after re-

viewing the decisions on both sides of this question, reached the conclusion that the contract is indivisible. We quote the following from 1 Wood, Fire Ins. p. 384: "It is difficult to understand how it can be held that these contracts are several, when a gross premium is paid for the entire insurance. The court cannot say, as a matter of law, neither can the fact be shown, that the insurer would have been satisfied to take the risk separately at the same premium. By consenting to pay a gross premium for the insurance, the assured has signified his willingness to let the policy stand as an entire contract, subject in all its parts to the conditions imposed by the insurer; and there is neither reason nor equity in permitting the assured, after he has violated one of the conditions of the policy as to a part of the risk, to turn around and say that this condition only affected that portion of the risk to which the breach related." Mr. Ostrander, after an elaborate review of the decisions, reaches the conclusion that those which hold the contract to be entire announce the sounder and better rule. Ostr. Fire Ins. § 23 et seq. See, also, 2 Joyce, Ins. § 1931; 1 May, Ins. § 277.

In support of the views herein announced, we find the courts of last resort of Maine, Wisconsin, Maryland, Minnesota, Virginia, New Hampshire, Massachusetts, Vermont, Pennsylvania, New Jersey, Michigan, Indiana, Arkansas, Iowa, Alabama, and Connecticut. It would not be profitable here to do more than cite the decisions of these courts. Reduced to their last analysis, they simply hold that the premium being for a gross sum evidences an intention on the part of the parties that the contract should be treated as entire, and that the intention of the parties, when ascertained, must be enforced. See *Richardson v. Insurance Co.*, 46 Me. 394, 74 Am. Dec. 459; *Barnes v. Insurance Co.*, 51 Me. 110, 81 Am. Dec. 562; *Hinman v. Insurance Co.*, 36 Wis. 159 (Syl., point 7); *Burr v. Insurance Co.*, 84 Wis. 76, 54 N. W. 22, 36 Am. St. Rep. 905; *Insurance Co. v. Assum*, 5 Md. 165; *Bowman v. Insurance Co.*, 40 Md. 620; *Plath v. Insurance Co.*, 23 Minn. 479, 23 Am. Rep. 697; *Moore v. Insurance Co.*, 69 Va. 508, 26 Am. Rep. 373; *Baldwin v. Insurance Co.*, 60 N. H. 422, 49 Am. Rep. 324; *Friesmuth v. Insurance Co.*, 10 Cush. (Mass.) 587; *Lee v. Insurance Co.*, 3 Gray (Mass.) 583; *Kimball v. Insurance Co.*, 8 Gray (Mass.) 33; *McGowan v. Insurance Co.*, 54 Vt. 211, 41 Am. Rep. 843; *Gottzman v. Insurance Co.*, 56 Pa. 210, 94 Am. Dec. 55; *Trustees of Fire Ass'n v. Williamson*, 26 Pa. 196; *Martin v. Insurance Co.*, 57 N. J. Law, 623, 31 Atl. 213; *Insurance Co. v. Resh*, 44 Mich 55, 6 N. W. 114, 38 Am. Rep. 228; *McQueeney v. Insurance Co.*, 52 Ark. 257, 12 S. W. 498, 5 L. R. A. 744, 20 Am. St. Rep. 179; *Garver v. Insurance Co.*, 69 Iowa, 202, 28 N. W. 555; *Assurance Co. v. Stoddard*, 88 Ala. 606, 7 South. 379 (Syl., point 5); *Essex Sav. Bank v. Meriden Fire Ins. Co.*, 57 Conn. 335, 17 Atl. 930, 18 Atl. 324, 4 L. R. A. 759.

It is true that none of the cases above cited dealt with a breach of the iron-safe clause, but in many of them the condition in the policy which was violated had no more connection with the property for which a recovery was sought than does the iron-safe clause to the building insured by the policy herein involved. In principle the cases are exactly in point. Opposed to this view are decisions of the court of last resort of Nebraska, Colorado, Kansas, and Missouri. See *Insurance Co. v. Schreck*, 27 Neb. 527, 43 N. W. 340, 6 L. R. A. 524, 20 Am. St. Rep. 696; *Insurance Co. v. Fairbank*, 32 Neb. 750, 49 N. W. 711, 29 Am. St. Rep. 459; *Insurance Co. v. Barker*, 6 Colo. App. 535, 41 Pac. 513; *Insurance Co. v. York*, 48 Kan. 488, 29 Pac. 586; *Insurance Co. v. Saindon*, 53 Kan. 623, 36 Pac. 983; *Loehner v. Insurance Co.*, 17 Mo. 247; *Trabue v. Insurance Co.*, 121 Mo. 75, 25 S. W. 848, 23 L. R. A. 719, 42 Am. St. Rep. 523. The courts of New York and Indiana seem to have been at different times on both sides of the question now under consideration. *Smith v. Insurance Co.*, 25 Barb. (N. Y.) 497; *Kiernan v. Insurance Co.*, 81 Hun, 373, 30 N. Y. Supp. 892; *Merrill v. Insurance Co.*, 73 N. Y. 452, 29 Am. Rep. 184; *Pratt v. Insurance Co.*, 130 N. Y. 206, 29 N. E. 117; *Havens v. Insurance Co.*, 111 Ind. 90, 12 N. E. 137, 60 Am. Rep. 689; *Insurance Co. v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393.

Our conclusion is that where an insurance policy is issued in consideration of a gross premium, and provides that the policy shall be void in the event of a breach of a certain condition therein named, and this condition is broken, no recovery can be had on the policy, though separate classes of property are therein insured, and though the stipulation violated relates solely to a matter which could have connection with but one of these classes. * * * Judgment reversed.

COLEMAN v. NEW ORLEANS INS. CO.

(Supreme Court of Ohio, 1892. 49 Ohio St. 310, 31 N. E. 279, 16 L. R. A. 174, 34 Am. St. Rep. 565.)

The New Orleans Insurance Company, on the 17th day of November, 1882, issued to H. Coleman & Co. a policy of fire insurance, whereby the company insured Coleman & Co. against loss or damage by fire for the period of one year from the date of the policy, to the amount of four thousand dollars, as follows: "\$200, on their one-story frame shingle-roof storehouse; \$3,800 on the general stock of merchandise, consisting principally of dry goods, groceries, clothing, boots and shoes, hats and caps, queensware, glassware, cutlery, and such other articles as are usually kept for sale in a country store; all contained in their one-story frame shingle-roof storehouse, situated in Pike county, Kentucky." On the 11th day of April, 1883, the prop-

erty was totally destroyed by fire; and thereafter proof of the loss was made out and forwarded to the company. The loss not having been paid, Coleman & Co. commenced an action against the insurance company in the court of common pleas of Scioto county, to recover the amount of the policy; the loss exceeding that sum. From a judgment for defendant, plaintiffs bring error.

WILLIAMS, J.²¹ The policy of insurance contains the provisions that, "if the assured is not the sole and unconditional owner of the property, or if any building intended to be insured stands on ground not owned in fee simple by the assured," the policy "shall become void, unless consent in writing by the company be indorsed thereon."

* * * The principal ground of contention is that the contract of insurance evidenced by the policy is so far severable as to entitle the plaintiffs to recover for the loss of the goods, though they may not be entitled to recover for the loss of the building, by reason of the state of the title to the land on which it stood.

Whether such a contract is so severable is a question upon which the adjudications of courts of the highest respectability are in direct conflict. The following are some of the cases which hold the contract to be entire: *Barnes v. Insurance Co.*, 51 Me. 110, 81 Am. Dec. 562; *Havens v. Insurance Co.*, 111 Ind. 90, 12 N. E. 137, 60 Am. Rep. 689; *Cuthbertson v. Insurance Co.*, 96 N. C. 480, 2 S. E. 258; *Essex Sav. Bank v. Meriden Fire Ins. Co.*, 57 Conn. 335, 17 Atl. 930, and 18 Atl. 324, 4 L. R. A. 759.

On the other hand, such contracts are held severable in the following, and other cases: *Insurance Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Insurance Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115; *Loehner v. Insurance Co.*, 17 Mo. 247; *Koontz v. Insurance Co.*, 42 Mo. 126, 97 Am. Dec. 325; *Insurance Co. v. Lawrence*, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; *Merrill v. Insurance Co.*, 73 N. Y. 452, 29 Am. Rep. 184; *Schuster v. Insurance Co.*, 102 N. Y. 260, 6 N. E. 406. And such we understand to be the effect of the decision in *Clark v. Insurance Co.*, 6 Cush. (Mass.) 342, 53 Am. Dec. 44. There the policy, for a gross premium, insured the plaintiff's "tavern house," to the amount of \$2,200, and his shop, valued at \$300. The act of incorporation of the defendant provided "that, when any property insured by this company shall in any way be alienated, the policy shall thereupon be void, and should be surrendered to the directors, to be canceled." The shop was alienated by the assured, and the "tavern house" was afterwards destroyed by fire. It was held that the alienation of the shop did not prevent a recovery for the loss of the tavern. The court say: "The next ground taken by the defendants is that the shop, which was insured in the same policy, had been alienated by the plaintiff, and that this is such an alienation as will avoid the policy. But the shop was valued separately, and was insured separately, as a separate,

²¹ Part of the opinion is omitted and the statement of facts is rewritten.

distinct, independent subject of insurance, though insured in the same policy. The alienation of the shop would no doubt avoid the policy *pro tanto*, and only *pro tanto*. The tavern house and the shop being insured separately, the alienation of one would no more affect the insurance on the other than if they had been insured in separate policies."

In the case of *Insurance Co. v. Walsh*, cited above, two houses were embraced in the same policy, and insured for different sums for a gross premium paid, the policy providing that, if the insured premises should remain vacant for a certain time without notice to the company, the policy should become void; and it was held that the fact that one of the buildings remained thus vacant without notice to the insurer would not invalidate the policy as to the other.

The action in *Loehner v. Insurance Co.*, 17 Mo. 247, was upon a fire policy covering a dwelling house and furniture therein. It was held: "A policy may be void in part and valid in part, if the subject-matter is capable of being separated; and, although a failure to disclose an incumbrance would avoid the policy as to the house insured, it would not avoid it as to furniture insured in the same policy, but separately appraised, unless the fact concealed was material to the risk."

Koontz v. Insurance Co., 42 Mo. 126, 97 Am. Dec. 325, was a case where a policy of insurance upon a certain livery stable was made to cover both personal and real property, and the application of the assured contained a false warranty touching incumbrances upon the real estate; and where it further appeared that the personal property was separately appraised, and nothing showed that the representations as to the incumbrances upon the stable formed any inducement to the execution of the policy covering the personal property. The court held that the assured might recover the value of the latter, although the policy was rendered void as to the real estate by reason of such false warranty.

The case of *Insurance Co. v. Lawrence*, 4 Metc. (Ky.) 9, 81 Am. Dec. 521, is much like the one before us. There, the appellant, (company,) for a premium of \$14, insured J. B. Lawrence & Co. against loss by fire from the 25th of May, 1858, to the 25th of May, 1859, "to the amount of \$200 on their frame storehouse, situated on the Ohio river, in Gallatin county, Kentucky, known as 'Jackson's Landing,' and \$1,200 on the stock of goods in said storehouse." The premises and goods were destroyed by fire on the 5th of April 1859, and suit was brought on the policy for the value of the goods, but not for the loss of the building. One defense was that Lawrence & Co., when they obtained the insurance, represented themselves to be the owners of the house, when in fact they were not, which, by the terms of the policy, rendered it void. But the court held, "in the absence of proof that the plaintiffs procured the insurance upon the house for a fraudulent purpose, or that their supposed interest in the house induced the defendant to insure the goods, that this does not vitiate the insurance on the goods;" and the plaintiffs had judgment.

In the case of *Merrill v. Insurance Co.*, 73 N. Y. 452, 29 Am. Rep. 184, the policy, for one premium, insured the plaintiff against loss or damage by fire to the amount of \$6,000, as follows: "\$1,000 on dwelling house and wood house, if attached; \$300 on household furniture therein; \$200 on provisions, etc., therein," and various other items of property described in the policy, each having a sepecific valuation therein set forth. The policy contained a condition that, if the property insured was incumbered by mortgage or otherwise, unless so represented in the application, the policy should be void; also, that if it should become incumbered by mortgage, judgment, or otherwise, policy should be void until the written consent of the company was obtained. The real estate was incumbered, and that fact was set up in defense of the action on the policy; and it was claimed by the defendant that it not only avoided the policy as to the building insured, but also as to the chattel property; and whether it did or not it was conceded depended upon whether the contract was entire or severable. In a well-considered opinion Judge Folger, after commenting upon various decisions on the subject, discusses the question on principle, and in the course of the discussion says:

"It is plain from the fact of a separate valuation having been put by the parties upon the different subjects of the insurance that they looked upon them as distinct matters of contract. The effect of a separate valuation was to make them so. No matter how much value there might have been in any one of those subjects, even to the whole amount of the policy, had it been totally destroyed, the defendants could not have been made liable to an amount greater than that named in the policy as the valuation of it. Thus it was, at the inception of the contract, distinguished from the other subjects of insurance, and the contracts so made as to be capable of application to it alone. So, too, if but one of the subjects of insurance had been burned, the defendants (*ceteris paribus*) could not have avoided liability to pay for that up to the value put upon it; and, if not wholly destroyed, but so far damaged as to reach in deterioration the value put upon it in the policy, the defendants would have to pay that damage; and that subject would no longer form a part of the general matter insured, and hence not a part of the continuing contract. Thus there would of necessity be a severance of the contract worked out by the operation of its own terms. Again, the principle, in the case of a contract about several things, but with a single consideration in gross, is this: that we are not able to say that the party would have agreed for one, or for more than one, yet less than all of them, without he could at the same time acquire a right to have them all. But our daily experience and observation shows that an insurance company is as ready to insure buildings without insuring the contents, and the contents without insuring the buildings, as to insure them together; so that the principle does not press so hard in considering such a contract as that before us. Besides, it is the rule that an agreement embracing several

particulars, though made at one time, and about one affair, may yet have the nature and operation of several different contracts; as, when they admit of being separately executed and closed, as we have instanced just above, where the contract may be taken distributively, each subject being considered as forming the matter of a separate agreement after it is so closed. Per Washington, J., *Perkins v. Hart*, 11 Wheat. 237-251 (6 L. Ed. 463), *Rodemer v. Hazlehurst*, 9 Gill (Md.) 294. In our judgment, this rule applies fitly to the contract in hand. It admits of being separately executed and closed as to each of the separate subjects of insurance. When one species of the property insured is burned, a contract to insure as to that may be performed as to that alone. The insured has paid the premium. A fire doing damage to that subject, the damage may be paid for by the insurer, and that subject be thus put out of the contract, while it remains in fieri as to all the other subjects named in it. When there are several subjects of insurance (as there are fourteen here) separately valued, on which a gross sum is insured not exceeding the aggregate of that valuation, for the insurance of which a premium in gross is paid, it is easy to see what is the rate of premium on the whole valuation, and what is the amount of premium on each subject insured. This being so, it seems fanciful to say that, if the facts thus easily reached were stated in detail in the contract, it would be severable, while, not being specifically spread out, it is entire. If there were anything in the terms or nature of the particular contract, or in the circumstances of the case, or in the nature of the different subjects of the insurance, from which it was to be inferred that the insurer would not have been likely to have assumed the risk on one of several of them, unless induced by the advantage and profit of having a risk on all, that would be a rational cause for deeming the contract entire. But when, for aught that appears, it is indeed as likely that the insurer would have taken a risk upon any one or any few of the subjects insured, at the same rate of premium as upon the whole, and has in the policy so separated the subjects, and so singled them out by a specific valuation, as that there is no difficulty in distinguishing the subject from the rest, and closing the contract as to that separately, and carrying forward the contract as to the rest, it does result that the contract is separable in practical operation, and hence, in law. And so, also, that, though there may have been some conduct of the insured as to some of the property, not evil in itself, but working a breach of a condition in its letter, the effect of that breach may be confined to the insurance upon that property, the contract as to that be held avoided, and as to the other subjects be held valid."

Forfeitures do not readily find favor in the law, and courts are reluctant to declare and enforce them, if by reasonable interpretation it can be avoided. It is not likely that in this case the small amount of insurance on the storehouse constituted any inducement for the

insurance placed upon the stock of goods; and it does not appear that the rates upon these classes of property were different, nor how it could make any difference if they were, since the only effect, in this respect, of holding the contract severable, is that the insurance company is enabled to retain the whole of the premium, which it accepted as the consideration for the insurance of all of the property, for the lesser risk on part of the property only; and it is not to be presumed that the premium for the insurance of part only of the property would exceed that accepted for the risk on all of it. It was not shown at the trial that the plaintiffs were guilty of any misrepresentation or intentional concealment concerning the title to the land on which the storehouse stood. No inquiry was made of them about it. The subject was not a matter of negotiation between the parties in effecting the insurance, and the plaintiffs were ignorant of the condition, for the breach of which the company claims the right to forfeit the whole policy. If the position taken by the company be correct, the condition was broken when the policy issued, and there was, therefore, no consideration for the premium that was paid, for no risk attached; and yet the company, while asserting the invalidity of the contract, holds onto its fruits. This is not a very consistent position, nor a very just one. A just result is reached, and, as we think, the lawful one, by holding, as we do, that the contract of insurance in this case is severable, and the breach of the condition as to the title of the land does not defeat the plaintiff's right to recover for the loss of the stock of goods insured by the policy in suit. It follows that, in our view of the case, the court erred in the instructions we have referred to, for which error the judgment is reversed.

TRABUE v. DWELLING HOUSE INS. CO.

(Supreme Court of Missouri, 1894. 121 Mo. 75, 25 S. W. 848, 23 L. R. A. 719, 42 Am. St. Rep. 523.)

GANTT, P. J.²² * * * The defendant company, by the policy of insurance on which this suit is based, insured Anthony E. Trabue against loss by fire or lightning for a term of five years, beginning at noon on the 20th day of April, 1888, in the sum of \$800, on the dwelling house occupied at the time by said Trabue, and the sum of \$250 on the contents of said dwelling house, and also \$200 on other property which escaped the fire. The insured was the owner of the insured property. On the 1st day of February, 1889, said insured died at his place of residence. * * * The insured left a will, by which he devised to his wife, Christiana Trabue, one-third of his estate during her widowhood, and the residue and remainder he devised to his

²² Part of the opinion is omitted.

four children, his only descendants, plaintiffs herein, in equal parts. * * * The property was destroyed by fire October 16, 1890. At the time of the loss the plaintiff Christiana Trabue was occupying the house as a dwelling house. Three of her children—the plaintiffs Taylor J. Trabue, Kitty R. Trabue, and Mary G. Trabue—were living with her as a part of her family.

Prior to said loss the plaintiffs, in an ex parte proceeding in the Ralls circuit court, had the real estate devised to them by said Trabue partitioned among them, and that portion on which said dwelling house stood, including said house, was set off to said Christiana Trabue during her natural life or widowhood. Notice and proof of loss were given, and the property was worth the amount claimed. The personal property insured was in said house in the possession of Christiana Trabue at the time of the loss. * * * The policy contained this clause: "This entire policy shall be void if any change (other than by death of the insured) takes place in the interest, title, or possession of the subject of insurance, whether by legal possession or judgment or by voluntary act of the insured or otherwise."

The circuit court gave judgment for plaintiffs for the whole amount of the policy, and defendant appealed to the St. Louis court of appeals, where the judgment was reversed without remanding, but, the decision being in conflict with the decision of the Kansas City court of appeals in *Crook v. Insurance Co.*, 38 Mo. App. 582, the cause was certified to this court under the mandate of section 6 of the constitutional amendment of 1884.

The St. Louis court of appeals held the policy was avoided as to the dwelling house by the transfer of the title thereto by the partition proceedings and judgment therein between the devisees of Anthony E. Trabue, the loss having occurred after that decree. * * *

As this judgment, on its face, only affected the real estate covered by said policy, the plaintiffs insist they are entitled to recover the insurance on the personal property, as to which there was no breach of any condition in the policy; but the defendant insists that by the use of the terms "entire policy" in said clause the whole policy is avoided for a breach in any respect. If defendant's contention be correct, it is a most appropriate subject for legislative correction at the earliest opportunity. But is this clause properly construed by the court of appeals?

As early as the case of *Loehner v. Insurance Co.*, 17 Mo. 247, it was held by this court that where a firm obtained insurance upon a storehouse and a stock of goods therein in separate amounts, and the insurance on the house was avoided because the interest in the house was incorrectly described in the application, the policy was not vitiated as to the goods; in other words, this court then held that such a contract was divisible. Afterwards, in *Koontz v. Insurance Co.*, 42 Mo. 126, 97 Am. Dec. 325, the action was on a policy by defendant on a livery stable, the live stock, and personal property, each separately

stated and appraised. In that case Judge Wagner reviewed the cases, and admitted there was a conflict between the decisions, but held that *Loehner v. Insurance Co.*, 17 Mo. 247, was a binding authority, and "cheerfully followed it, because this court regarded it as in consonance with justice." These two cases have never been overruled, or their authority questioned, until the decision of *Insurance Co. v. Barnett*, 73 Mo. 364, 39 Am. Rep. 517.

The very able and learned judge of the St. Louis court of appeals who prepared the opinion in *Holloway v. Insurance Co.*, 48 Mo. App. 1, considered *Insurance Co. v. Barnett* as the controlling decision, and followed it, as required by the constitution of his court; and in this case Thompson, J., treated the point as decided by the *Holloway Case*, and as clear of all difficulty. Since then the Kansas City court of appeals, in *Shoup v. Insurance Co.*, 51 Mo. App. 286, has followed Judge Rombauer's decision in the *Holloway Case*; so that it becomes very important to determine the effect of the *Barnett Case*.

An examination of that case will show that the remarks of the learned judge who delivered that opinion were entirely "obiter dicta" as to this question of the divisibility of the contract. He says, "if such a stipulation was in fact in the policy," the plaintiff would be entitled to the full relief prayed; so that it is clear no such clause was before the court; and, while his opinion is entitled to respect on the supposed case, it is equally clear that the court did not overrule the decision in *Loehner's Case* or *Koontz's Case*, but, on the contrary, on the only point that was in fact before the court, those cases were treated as binding authority. Our conclusion is that so much of Judge Norton's opinion as referred to the entirety of the policy in the *Barnett Case* was obiter, and did not overrule the *Koontz* and *Loehner Cases*.

But, independent of the binding authority of those cases, we think they were correctly decided. In both of those cases "the policy" was to be void upon certain conditions. Here it is said "the entire policy" shall be avoided. "The policy" includes all and every part of it, and the insertion of the word "entire" cannot add anything more to it, so that this mere verbal addition has not, in our opinion, changed the law of the case. The cases cited by Judge Norton from Pennsylvania, Maine, Maryland, and other states are based upon the case of *Friesmuth v. Insurance Co.*, 10 Cush. (Mass.) 587. By the laws of Massachusetts the policy in that case was a lien on the interest of the assured in both the building and personal property insured. In holding that such a policy was an indivisible contract, Judge Bigelow put it upon the ground "that the consideration was regarded as an entirety, for which the deposit note was given, and the liability of the assured to assessments on that amount in case of losses." He said: "They [the company] had a right to look to their lien on each and all of different kinds of property insured by them for the security of the whole amount of the note;" and so

that policy said on its face. Upon the facts of that case no question can be made of its correctness. The lien was given on all the property. A false representation affected all of the lien. On the same principle stand the subsequent cases of *Brown v. Insurance Co.*, 11 Cush. (Mass.) 281; *Gould v. Insurance Co.*, 47 Me. 403, 74 Am. Dec. 494. In *Gottsman v. Insurance Co.*, 56 Pa. 210, 94 Am. Dec. 55, Judge Thompson cites the *Friesmuth Case*, and those based on that case, without, however, adverting to the statutory lien.

That other courts have adopted this construction of the entirety of the contract is not questioned, but, entertaining for them, as we do, all due respect, we see no reason for departing from our own decisions when they are based upon what appears to us the soundest reason. When one applies for distinct and separate insurance, a part on real estate, a part on personal property, he can require two separate policies. The accidental circumstance that for convenience merely they are included in one policy does not merge them into one. If the goods alone were destroyed, the terms of the policy applying to them alone could be made the basis of recovery. The supposed danger of making a contract for the parties is not in the case. The question is whether, according to legal principles, the contract made is severable or entire. There is nothing to indicate the company would not have assumed the risk on the house without taking one also on the goods, nor vice versa. The contract as to each admitted of being separately executed as to the separate subjects of insurance. The application is for separate insurance, and it is kept distinct in the policy.

Nor are the Cases of *Koontz* and *Loehner*, *supra*, unsupported by authorities in other states. In *Insurance Co. v. Lawrence*, 4 Metc. (Ky.) 9, 81 Am. Dec. 521, the supreme court of Kentucky held that when insurance was obtained upon a storehouse and stock of goods, in an action for loss on the goods the fact that the insurance on the house was void because the interest on the insured was incorrectly stated did not vitiate the policy on the goods, but it would be treated as a separate policy; citing *Loehner v. Insurance Co.*, 17 Mo. 247, with approval. In *Clark v. Insurance Co.*, 6 Cush. (Mass.) 342, 53 Am. Dec. 44, a policy made separate insurance on two buildings, with a clause declaring it void if the insured should alienate the property. It was held that alienation of one building did not avoid it as to the other. In *Merrill v. Insurance Co.*, 73 N. Y. 452, 29 Am. Rep. 184, the policy was upon several separate and distinct classes and species of property, each, as in the case at bar, separately valued; the sum total of the valuation was insured for a premium in gross; the contract was held severable. Judge Folger reviewed all the cases, including the two cases of *Loehner* and *Koontz*, *supra*, decided by this court, and in a most satisfactory manner sustained the reasoning of those cases upon the analogies of the law and the proper construction of the contract. *Johnson v. Johnson*, 3 Bos. & P. 162; *Mayfield v.*

Wadsley, 3 Barn. & C. 327; Goring v. Insurance Co., 10 Ont. 236; Insurance Co. v. Walsh, 54 Ill. 164, 5 Am. Rep. 115; Date v. Insurance Co., 14 U. C. C. P. 548; Deidericks v. Insurance Co., 10 Johns. (N. Y.) 234; Trench v. Insurance Co., 7 Hill (N. Y.) 122; Phillips v. Insurance Co., 46 U. C. Q. B. 334; Heacock v. Insurance Co. (unreported), referred to in Merrill v. Insurance Co., 73 N. Y. 462, 29 Am. Rep. 184; Moore v. Insurance Co., 69 Va. 508, 26 Am. Rep. 373.

The Merrill Case came under review in 1886 in Schuster v. Insurance Co., 102 N. Y. 260, 6 N. E. 406, and was unanimously sustained. In 1891, in Pratt v. Insurance Co., 130 N. Y. 206, 29 N. E. 117, the question again recurring, the court of appeals says: "Whatever may be the rule elsewhere, it is settled in this state that where insurance is made on different kinds of property, each separately valued, the contract is severable, even if but one premium is paid, and the amount insured is the sum total of the valuations." See, also, Smith v. Insurance Co., 47 Hun (N. Y.) 30; Woodward v. Insurance Co., 32 Hun (N. Y.) 365; Insurance Co. v. Fairbank, 32 Neb. 750, 49 N. W. 711, 29 Am. St. Rep. 459.

In the very recent case of Coleman v. Insurance Co., 49 Ohio St. 310, 31 N. E. 279, 16 L. R. A. 174, 34 Am. St. Rep. 565, the supreme court of Ohio aligns itself in this conflict of authority on the side taken by this court in Loehner v. Insurance Co., 17 Mo. 247, and Koontz v. Insurance Co., 42 Mo. 126, 97 Am. Dec. 325, holding such contracts as this severable. Vide, also, Rogers v. Insurance Co., 121 Ind. 570, 23 N. E. 498; Insurance Co. v. Spankneble, 52 Ill. 53, 4 Am. Rep. 582; Quarrier v. Insurance Co., 10 W. Va. 530, 27 Am. Rep. 582; Insurance Co. v. Schreck, 27 Neb. 527, 43 N. W. 340, 6 L. R. A. 524, 20 Am. St. Rep. 696.

When this contract was made, then, it was the settled rule of decision in this state that such a contract as this was divisible or severable, although the policy had a clause which would avoid the whole contract. The addition of the word "entire," given its utmost latitude, could not avoid any more than the whole policy; hence it added nothing to the policy. Forfeitures are not favored in the law, and will not be enforced if any reasonable interpretation can be made which will prevent one. No reason is given here why a forfeiture should be enforced, except the insertion of the word "entire" into the policy. The risk was not increased. The premiums were taken, kept, and enjoyed for insurance on the personal property. The policy as to the house was avoided, doubtless, through the ignorance of the insured; but they have violated no condition as to this personal property. Holding, then, as we do, that this was a divisible contract, it results that the legal effect is the same as if two distinct and separate policies were issued, and, so reading the contract, we do not reject the word "entire" at all, but apply it to that policy, or portion of this policy, which the insured has forfeited by the change of title

to which alone this clause refers; and it avoids that "entire" policy, and not the policy in which no condition or warranty has been broken. This construction logically follows from the divisibility of the contract, and best accords with fair dealing and the presumed intention of the parties.

Our conclusion is that neither the law nor common honesty will permit the defendant to avoid paying the loss as to this personal property. The judgment of the St. Louis court of appeals is affirmed in so far as it adjudged the policy on the dwelling house avoided, and reversed in so far as it avoids the insurance on the personal property, and the cause is remanded to that court with directions to affirm the judgment of the circuit court to the amount of \$250, the amount of insurance on personal property and piano, and reverse it as to the remainder of said judgment. The costs of the appeal to this court are adjudged to plaintiffs, and the costs of the appeal to the St. Louis court of appeals are adjudged to defendant, as also the costs in the circuit court, after the offer of judgment was made; the other costs to plaintiffs. All concur.

TAYLOR v. ANCHOR MUT. FIRE INS. CO.

(Supreme Court of Iowa, 1902. 116 Iowa, 625, 88 N. W. 807, 57 L. R. A. 328, 93 Am. St. Rep. 261.)

Action to recover for a loss within the terms of a policy of fire insurance. There was a judgment on a verdict for plaintiff, from which defendant appeals.

McCLAIN, J.²³ The application on which the policy was issued represented that insured owned 93 acres of land, "on which the property to be insured is located," of the value of \$35 per acre; that there was \$900 incumbrance thereon; that he had a fee-simple title to the land "on which the above-described property to be insured is situated"; and that his title was undisputed to the property proposed for insurance; and these representations were, in the policy, warranted to be correct. The policy specifies the risk assumed as follows: "\$250 on frame dwelling house; \$250 on household furniture, beds, and bedding while therein; \$50 on family wearing apparel therein; \$25 on sewing machines while therein; \$50 on silver and plated ware while therein, and family jewelry, books, pictures, picture frames; \$100 on work horses, mules, and colts on premises, and against loss by lightning, at large or in use, not to exceed \$75 on each; \$100 on cattle on premises; \$100 on grain in building; \$25 on wagons, carriages, and harness." It is provided in the policy not only that it shall be void in case of false representations in the

²³ Part of the opinion is omitted and the statement of facts is rewritten.

application, or in case of change in title or possession, but also that it shall be void after any sale, conveyance, or incumbrance of the property insured, without the consent of the company. * * *

Subsequently to the issuance of the policy the insured gave a chattel mortgage on some of the cows and horses covered by the policy, and this is relied on by defendant as a breach of condition, avoiding the entire policy, and therefore preventing recovery for the loss, which was of the dwelling house and furniture therein. We may concede that the giving of the chattel mortgage was a breach of the condition of the policy as to the property covered by the mortgage, and we are therefore at once confronted with the question whether a breach of condition as to a part of the property covered by the policy will avoid the policy as to other property enumerated, and covered by a separate stipulation thereof, as to the amount of the risk assumed on such property. It will be seen at once that if the house and furniture had been included in one policy, and the animals in another, a breach of the condition of the policy covering the animals would not prevent recovery under the policy covering the dwelling house and furniture; but it is contended that, where an insurance on different classes of property is effected by a policy which states a gross premium, the contract is entire, although the risks assumed on the different classes of property are distinct and separate.

On this question the authorities are in hopeless confusion, and there are cases holding, without qualification, to the rule that the entirety of the premium is conclusive as to the entirety of the contract, so that a breach of condition as to one class of property will avoid the policy as to all, notwithstanding the two classes are included in separate clauses, as to the amount of loss to be paid. On the other hand, there are cases in which it is held that if the risks are separately enumerated the policy is divisible, notwithstanding the entirety of the premium. We think, however, the great weight of authority at the present time is to the effect that the question is one of the intention of the parties, and that, if the condition of the property is such that the risk as to one class of property would be affected by the destruction of the other, then it must be presumed that the breach of condition as to one class is a violation of the contract, also, as to the other class, because the company would not have insured the one except upon the condition imposed as to the other, while, if the loss of the one class of property could not affect the risk as to the other, then it must be presumed that there was no intention that the conditions as to one should apply to the risk as to the other.

In support of this construction we find the following pertinent language used by the supreme court of New York in the case of *Merrill v. Insurance Co.*, 73 N. Y. 452, 29 Am. Rep. 184: "When there are several subjects of insurance (as there are fourteen here), sep-

arately valued, on which a gross sum is insured, not exceeding the aggregate of that valuation, for the insurance of which a premium in gross is paid, it is easy to see what is the rate of premium on the whole valuation, and what is the amount of premium on each subject insured. This being so, it seems fanciful to say that, if the facts thus easily reached were stated in detail in the contract, it would be severable, while, not being specifically spread out, it is entire. If there were anything in the terms or nature of the particular contract, or in the circumstances of the case, or in the nature of the different subjects of insurance, from which it was to be inferred that the insurer would not have been likely to have assumed the risk on one or several of them unless induced by the advantage and profit of having a risk on all, that would be a rational cause for deeming the contract entire. But when, for aught that appears—when, indeed, it is as likely that—the insurer would have taken a risk upon any one or any few of the subjects insured at the same rate of premium as upon the whole, and has in the policy so separated the subjects, and so singled them out by a specific valuation, as that there is no difficulty in distinguishing one of the subjects from the rest, and closing the contract as to that separately, and carrying forward the contract as to the rest, it does result that the contract is severable in practical operation, and hence in law. And so, also, that, though there may have been some conduct of the insured as to some of the property, not evil in itself, but working a breach of a condition in its letter, the effect of that breach may be confined to the insurance upon that property, the contract as to that may be held avoided, and as to the other subjects held valid. There is another rule—that in construing the consideration, as entire or distributed, the law will be guided by a respect to general convenience and equity, and by the good sense and reasonableness of the particular case; for it must be supposed that it was the intention of the parties that such a construction should take place, in the occurrence of contingencies not contemplated and provided for at the making of the contract.”

In *Insurance Co. v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393, the court uses this language: “In this case we are unable to see how the risk on the house named in the second and third paragraphs of the answer could affect the risk on the barn or the personal property, for the destruction of which the suit was prosecuted. The risks on the different items of property named in this policy are many of them separate and distinct. It is true that the risk on the household goods in the house would be affected by whatever would affect the risk on the house; so the risk on the grain in the barn would be affected by whatever would affect the risk on the barn; but we think it impossible to conceive how the risk on the barn could affect the risk on the house, or vice versa.” And it was accordingly held in another action between the same parties (*Pickel v. Insurance Co.*, 119 Ind. 291, 21 N. E. 898) that while, under the

former case, the policy should be treated as several with reference to the different buildings, it was indivisible with reference to the risk on the house, and personal property contained therein, although they were enumerated under separate clauses in describing the loss to be paid; and the doctrine of these cases is reiterated by the same court in *Geiss v. Insurance Co.*, 123 Ind. 172, 24 N. E. 99, 18 Am. St. Rep. 324, where it was held that although different classes of personal property, involving the same risk, were separately enumerated, a breach of condition as to one would be a breach as to all.

To the same effect, it was held in *Loomis v. Insurance Co.*, 77 Wis. 87, 45 N. W. 813, 8 L. R. A. 834, 20 Am. St. Rep. 96, that, "although the insurance is distributed to the different items of insured property, the contract is indivisible if the breach of contract as to an item of the property affects, or may reasonably be supposed to affect, the other items by increasing the risk thereon." In support of the same general proposition, see *Loehner v. Insurance Co.*, 17 Mo. 247; *Koontz v. Insurance Co.*, 42 Mo. 126, 97 Am. Dec. 325; *Insurance Co. v. Lawrence*, 4 Metc. (Ky.) 9, 81 Am. Dec. 521; *Insurance Co. v. Crawford*, 121 Ala. 258, 25 South. 912, 77 Am. St. Rep. 55; *Assurance Co. v. Glenn*, 13 Ind. App. 365, 40 N. E. 926, 41 N. E. 847, 55 Am. St. Rep. 225. A recent case strongly supporting the proposition that the contract is indivisible, and a breach of condition as to one class of property will avoid it as to all the property covered, is *Insurance Co. v. Knight*, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216.

But it is unnecessary to elaborate by quotations from or citations of the many cases in which this question has been considered. The citations found in several of the recent cases above referred to cover the whole ground. It may be said, further, that several cases in which the courts have announced the unqualified rule that a breach of condition as to one class or item of property covered by the policy will constitute a breach of the contract as to all the property covered are cases where the different classes or items of property were so situated with reference to each other that the risk as to one constituted a risk as to all, and in these cases the same result might have been reached by adopting the rule which we have above announced as supported by the weight of authority. See, as illustrations, *Lee v. Insurance Co.*, 3 Gray (Mass.) 583; *Association v. Williamson*, 26 Pa. 196; *Insurance Co. v. Hamilton*, 82 Md. 88, 33 Atl. 429, 30 L. R. A. 633, 51 Am. St. Rep. 457; *Cuthbertson v. Insurance Co.*, 96 N. C. 480, 2 S. E. 258. It may be noticed, also, that the North Carolina court, in a later case than that last cited, although not involving the same question, has held that where the policy classifies and specifies numerous items of property, and the sums of money for which they are severally insured, the contract is not single, but severable. *Pioneer Mfg. Co. v. Phoenix Assur. Co.*, 110 N. C. 176, 14 S. E. 731, 28 Am. St. Rep. 673.

The question has not been fully discussed in any cases which have been decided by this court. In *Garver v. Insurance Co.*, 69 Iowa, 202, 28 N. W. 555, the proposition is broadly laid down that where the premium is in gross the contract is not divisible, and a breach of warranty as to a part of the property will vitiate the policy as to the whole. But it is to be noticed that there the policy covered a barn and certain horses, and the court might well have held that the risk, so far as the horses were concerned, was involved in any risk affecting the barn; and the conclusion was therefore in accordance with the rule which we think to be the proper one, although we do not regard the reason given as satisfactory. In *Kahler v. Insurance Co.*, 106 Iowa, 380, 76 N. W. 734, the view expressed in the *Garver* Case was qualified so as to leave the way open for adopting the position which we now take. We therefore hold on this question, as involved in the case before us, that entirety of premium does not necessarily prove that the contract is indivisible, and that where it appears from the terms of the policy that distinct items or classes of property were separately insured the policy may be valid as to one item or class, although it is invalid as to another item or class by reason of breach of conditions of the policy with reference thereto, provided it appears, also, that the risk which it was intended to exclude by the condition which is broken does not apply to the other items or classes of property. In this case a chattel mortgage on the cows and horses could not in any way affect the nature of the risk as to the dwelling house and contents, and therefore we find that a breach of a condition in the policy as to the one class of property did not invalidate the insurance as to the other. * * * Affirmed.²⁴

²⁴ As to entirety or divisibility of risk, see, also, *Havens v. Home Ins. Co.*, 111 Ind. 90, 12 N. E. 137, 60 Am. Rep. 689 (1887); *Phoenix Ins. Co. v. Pickel*, 119 Ind. 155, 21 N. E. 546, 12 Am. St. Rep. 393 (1889). Compare, *Clinton v. Norfolk Mutual Fire Ins. Co.*, post, p. 68.

PARTIES

I. Contracts Made by Insurers Not Complying with Statutory Requirements ¹

PENNYPACKER v. CAPITAL INS. CO.

(Supreme Court of Iowa, 1890. 80 Iowa, 56, 45 N. W. 408, 8 L. R. A. 236, 20 Am. St. Rep. 395.)

Action on a policy of fire insurance on property situated in Pennsylvania. The defendant answered alleging that the policy was void because the company, an Iowa corporation, had not complied with the laws of Pennsylvania in relation to foreign insurance companies. The requirements of the laws of Pennsylvania are "that, before any insurance company not of that state shall be permitted to transact any insurance business within the state of Pennsylvania, or to issue any policies of insurance upon property within said state, either by itself or agents, a certificate must be obtained of the insurance commissioner of said state certifying that it has so complied with the laws of Pennsylvania, and is authorized to transact such business within the state; that any company, not of said state, that shall do an insurance business within said state without having first qualified itself as provided, and without first receiving the certificate required, shall pay a fine and penalty for such offense to said state."

The plaintiff demurred to the answer on the following grounds: (1) The defendant is estopped from alleging its want of authority to do business in the state of Pennsylvania; (2) the statute of Pennsylvania does not render the contract of insurance referred to void; (3) the said count shows that the defendant is liable to a penalty for doing an unauthorized business in the state of Pennsylvania, but shows no defense to the claim of the plaintiff herein; (4) it does not appear that the alleged contract of insurance was made in the state of Pennsylvania, and therefore the laws of Pennsylvania regarding insurance would have no effect; (5) the defendant having issued to the plaintiff its policy of insurance, cannot now allege a violation of law on its part to avoid its liability under said policy.

This demurrer was sustained, and defendant excepted. There was a judgment for plaintiff and defendant appeals.

GIVEN, J.² The questions raised and argued on the demurrer may be resolved into the single inquiry, is the contract of insurance sued

¹ For discussion of principles, see Vance on Insurance, § 39. See, also, Cooley, Briefs on the Law of Insurance, vol. 1, pp. 581-594.

² Part of the opinion is omitted and the statement of facts is rewritten.

upon void? It is alleged that it is void because the defendant had not and was not entitled to qualify, under the laws of Pennsylvania, to contract insurance upon property in that state at the time this policy was issued, and because the plaintiff received it knowing that fact. For the purposes of the demurrer these allegations are to be taken as true, and we are to say whether, being true, they render the policy void. Appellant's contention is that the contract was made, and policy issued and accepted, in violation of the laws of Pennsylvania, as set out in the answer, and that, the plaintiff having received the policy knowing that fact, the parties are in *pari delicto*, and the law will not enforce the contract at the suit of either. Appellee contends that the policy was issued and is payable in Iowa, and its validity is therefore to be determined by the laws of Iowa, and that the statute set out did not forbid the issuing the policy in suit, nor make the same void, but simply declares the company liable to a fine for issuing it.

It does not appear from the answer, nor from it and the petition, where the contract was made, premium paid, or policy delivered, nor where it is payable. From the facts that the company is of Iowa, and the insured property in Pennsylvania, we may infer the contract to have been made in either state as readily as the other. Such being the state of the pleadings, we are not called upon to determine what effect the law of Pennsylvania would have upon this policy as an Iowa contract.

The principle that contracts made in violation of law are void is too well established to require citations. "The well-settled general rule is that, when a statute prohibits or attaches a penalty to the doing of an act, the act is void, and will not be enforced, nor will the law assist one to recover money or property which he has expended in the unlawful execution of it. Or, in other words, a penalty implies a prohibition though there are no prohibitory words in the statute, and the prohibition makes the act illegal and void. * * *

But, notwithstanding this general rule, it must be apparent to every legal mind that, when a statute annexes a penalty for the doing of an act, it does not always imply such a prohibition as will render the act void." *Pangborn v. Westlake*, 36 Iowa, 548. The law of Pennsylvania, as set out, provides that no insurance company not of that state shall insure property therein unless it has a certain amount of capital stock, has complied with certain requirements, and has obtained a certificate from the insurance commissioner that it is qualified to do business in that state, and that any such company that shall do business in that state without having first qualified itself, and without first having received a certificate, as prescribed, from the insurance commissioner, "shall pay a fine and penalty for such offense." The evident purpose of such a law is the protection of those paying for insurance upon property in that state. The prohibition and penalty is against the company only. No duty is required of

the insured, and no act upon his part expressly prohibited. There is nothing in the law declaring what effect it shall have upon policies issued and accepted as this is alleged to have been.

A number of cases are cited by appellant where, in actions brought by the insurance company to enforce rights under the contract of insurance, it was held that statutes similar to that set out were prohibitory and the contracts void; but in none of those cases is it held that they are void as to the assured. *The Manistee*, 5 Biss. 382, Fed. Cas. No. 9,027, is a case wherein the statute of Illinois was under consideration. That statute required foreign insurance companies to produce certain statements, and to procure authority from the auditor of state to transact business within the state, and declare it unlawful for any agent to do business without having first complied with those laws. It was provided that, upon conviction for violating these requirements, punishment by fine or imprisonment, or both, may be imposed. The court says: "Those statute laws do not declare void policies issued by foreign companies, through a local agent, in disregard or violation of them. The object of these statutes was for the security of citizens doing business with such companies, by bringing them as near as possible to local corporations, and also as a provision for revenue. Where a statute prohibits or annexes a penalty to its commission, the act is made unlawful; but it does not follow that the unlawfulness of the act was meant by the legislature to avoid a contract made in contravention of it. Where a statute is silent, and contains nothing from which the contrary can properly be inferred, a contract in contravention of it is void. But the whole statute must be examined in order to decide whether or not it does contain anything from which the contrary can be properly inferred. There is no penalty pronounced against a person for obtaining a policy from, or doing business with, the company that has not complied with the requirements of those statutes."

Insurance Co. v. McMillen, 24 Ohio St. 67, is somewhat in point. That was an action upon a policy of life insurance issued by the plaintiff in error. The company claimed that its failure to comply with a statute similar to that under consideration rendered the policy void. The court says: "Whether the statute was meant to invalidate policies issued by companies in contravention of its provisions is to be determined from a consideration of the statute as a whole. The object of the act is not to make the business of life insurance unlawful. The statute is designed for the protection of policy-holders and others dealing with insurance companies. To this end, it is made unlawful for persons to act on behalf of such companies until the provisions of the statute have been complied with. But we do not think it was intended to devolve on persons dealing with the companies the duty and risk of ascertaining whether they had complied with the statute. On the contrary, it seems to have been the in-

tention of the legislature to rely on the penalties imposed as sufficient to insure such compliance."

In *Pangborn v. Westlake*, *supra*, the question was whether a contract for the sale of a lot in a plat that had not been recorded was void because of the statute providing that any person who shall dispose of, or offer for sale, any lot in any town or addition until the plat was acknowledged and recorded, shall forfeit \$50 for each lot sold or disposed of. This statute is similar in several respects to that in question. It is quite as prohibitory. It is addressed to the seller alone. It is for the protection of the purchasers, and imposes no duty upon or prohibition against them. In passing upon the question, this court said: "We are, therefore, brought to the true test, which is that while, as a general rule, a penalty implies a prohibition, yet the courts will always look to the language of the statute, the subject-matter of it, the wrong or evil which it seeks to remedy or prevent, and the purpose sought to be accomplished in its enactment; and if, from all these, it is manifest that it was not intended to imply a prohibition, or to render the prohibited act void, the courts will so hold, and construe the statute accordingly." See, also, *Hill v. Smith, Morris*, 70; *Tootle v. Taylor*, 64 Iowa, 629, 21 N. W. 115.

It is argued that to hold this contract not prohibited is to defeat the purposes of the law; that it will admit foreign companies to do business subject only to such fines as may be assessed. In view of the language of the law as stated, the absence of express prohibition, and the evident purpose to protect the insured, we are clearly of the opinion that it was not intended to render contracts such as that in suit void. To so hold does not necessarily admit foreign companies to do business in that state in disregard of its laws. The power of the courts is ample to compel, by fine and otherwise, compliance with the law of the state. The contract being valid, the matter demurred to is no defense, and the question of estoppel does not arise. We think the demurrer was properly sustained. * * * Affirmed.³

SEAMANS v. CHRISTIAN BROS. MILL CO

(Supreme Court of Minnesota, 1896. 66 Minn. 205, 68 N. W. 1065.)

Action by S. H. Seamans, receiver of the Wisconsin Mutual Fire Insurance Company, against the Christian Bros. Mill Company, for an insurance premium. From a judgment for defendant, plaintiff appeals.

³ See, also, *Ganser v. Fireman's Fund Ins. Co.*, 34 Minn. 372, 25 N. W. 943 (1885), wherein it is said that plaintiff need not allege in his complaint that the company has complied with the laws of the state regulating foreign insurance companies.

CANTY, J.⁴ The Wisconsin Mutual Life Insurance Company is, as its name indicates, a corporation organized under the laws of the state of Wisconsin to carry on a mutual life insurance business. It became insolvent, and plaintiff was appointed receiver for it by the courts of that state. Defendant, a corporation organized under the laws of this state and doing business therein, procured from said insurance company a policy of insurance on its property situated in Minneapolis, in this state. This suit is brought to recover a balance of unpaid premium claimed to be due on the policy. One of the defenses alleged by defendant, and sustained by the court below, is that said insurance company never complied in any respect with the statutes of this state. Judgment was ordered for defendant, and from the judgment entered accordingly, plaintiff appeals.

The contract of insurance was made by correspondence between the two corporations. The trial court found as a fact that this contract was made in this state. Appellant assails this finding as not supported by the evidence, but, from the view we take of it, the point is not material; and we are of the opinion that even if the contract was made in Wisconsin, as contended by appellant, we would still refuse to enforce it, as being contrary to the policy of our laws, and an attempt to evade those laws. Among the statutory provisions material here are the following sections of the General Statutes of 1894:

"Sec. 3157. It shall be unlawful for insurers or their agents to make, negotiate or solicit within this state any contract of insurance except as authorized by this act. * * *

* * * Section 3167 provides that on complying with certain conditions the insurance commissioner may issue a license or certificate to foreign companies, authorizing them to transact business in this state; and section 3199 provides that no foreign mutual fire insurance company shall do business in this state unless it has an actual cash surplus of \$200,000 over all liabilities, which the court found this insurance company did not have. Many other restrictions on such companies may be found in the sections immediately preceding and those following the ones above mentioned.

These statutory provisions are police regulations intended to protect people and property in this state against spurious and irresponsible insurance companies. It is plainly the intent of these statutory provisions to compel all such insurers doing business in, or taking risks on property in, this state to comply with our local laws and submit to our local courts. Neither can there be any doubt about the authority of the legislature to pass such laws. *Paul v. Virginia*, 8 Wall. 168, 19 L. Ed. 357; *Hooper v. California*, 155 U. S. 648, 15 Sup. Ct. 207, 39 L. Ed. 297. It is a general rule that a contract made in one state will be enforced in another state, though contrary

⁴ Part of the opinion is omitted.

to the laws or public policy of the latter state. 3 Am. & Eng. Enc. Law, 543. This rule is more especially applicable when no particular place of performance is contemplated by the contract, but the place of performance may be anywhere. It is also a general rule that where a contract is entered into in one state, to be performed in a certain other state, the validity of the contract will be determined by the law of the latter state. *Id.* 542, 544; Whart. Conf. Laws, §§ 398, 486. We will not attempt to discuss the many and complex distinctions that have arisen where these two rules came in conflict. Usually, in such a case of conflict of laws, it is little more than a question of determining the intention of the parties to the contract,—whether they intended to be governed by the one law or the other. But cases arise where the parties are not thus at liberty to select which law they choose. See Whart. Conf. Laws, §§ 490–494.

The laws or public policy of a state may prohibit the making of a certain contract, but it does not follow that if the contract is made elsewhere such state may not, within its borders, enforce the same by extending to it the comity which exists between states. But, again, the laws and public policy of the state may be such as to completely stamp out this comity, and prohibit within the jurisdiction of the state the enforcement of the contract. Especially is this so if, though the contract was made elsewhere, it was to be performed within the state. There are many cases extending this doctrine of comity to contracts of insurance made elsewhere, and insuring property in the state in which the contract was enforced. See Whart. Conf. Laws, §§ 465–467. But, as before stated, it depends on the laws and public policy of such state whether or not it will thus enforce the contract. The laws and public policy may be such as to destroy this comity and prohibit such enforcement of the contract.

We are of the opinion that the laws and public policy of this state in reference to the insuring of property are of this character. The restrictions in our statutes are so many, and the repressive character of the legislation such, that we must hold this to be the public policy of this state. This seems also to be the character of the insurance legislation in Iowa and Michigan, as appears by the cases of *Seamans v. Zimmerman*, 91 Iowa, 363, 59 N. W. 290, and *Seamans v. Temple Co.*, 105 Mich. 400, 63 N. W. 408, 28 L. R. A. 430, 55 Am. St. Rep. 457, where this same receiver was defeated in attempts to collect unpaid premiums from citizens of those states. Neither does it make any difference that the insurer is a mutual company or that it is, as appellant claims, unincorporated. Neither is this decision in conflict with *Ganser v. Insurance Co.*, 34 Minn. 372, 25 N. W. 943, where it was held that the insured can recover the loss even though the insurer has not complied with the statutory requirements so as to be authorized to do business in this state. The very object of these statutory provisions is the protection of the insured, and the

parties are not in *pari delicto*. This disposes of the case, and renders it unnecessary to consider the other questions raised. Judgment affirmed.

II. Infants as Parties Insured⁵

JOHNSON v. NORTHWESTERN MUT. LIFE INS. CO.

(Supreme Court of Minnesota, 1894. 56 Minn. 365, 57 N. W. 934, 59 N. W. 992, 26 L. R. A. 187, 45 Am. St. Rep. 473.)

Action by Martin C. Johnson against the Northwestern Mutual Life Insurance Company to rescind a policy of insurance and recover the amount paid as premiums. From an order overruling a demurrer to the complaint, defendant appeals.

BUCK, J. On the 25th day of October, 1888, the plaintiff, Johnson, who was then a minor, 17 years old, obtained a policy of insurance on his own life in the Northwestern Mutual Life Insurance Company, this defendant, for the sum of \$1,000, in consideration of the payment by him of the premium of \$23.29, and the semiannual payment of a like sum to defendant on or before noon of the 25th days of October and April thereafter in each and every year during the continuance of the policy, viz. for 20 years. He made eight semiannual payments amounting to the total sum of \$186.32, and immediately thereafter plaintiff attained his majority, or full age of 21 years; and thereupon, on the 21st day of December, 1892, he duly served upon said defendant his notice in writing that he had arrived at his majority, and that he elected to avoid the contract of insurance between the defendant and himself, and offered to return said policy to the defendant, and demanded of the defendant that it return to him the moneys which he had paid to said company, amounting to the sum above named, which the defendant refused to do, whereupon he brought this action to recover of the defendant the amount so paid, upon the ground that he was an infant at the time of the execution of the said contract and during the times when he made the semiannual payments as herein stated.

The defendant interposed a demurrer to the plaintiff's complaint upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The court below overruled the demurrer, and the defendant appealed to this court.

In its memorandum the court below gave as its reason for overruling the demurrer that "this contract of insurance was not beneficial to the insured; it was for the benefit of third persons." We

⁵ For discussion of principles, see Vance on Insurance, § 41. See, also, Cooley, Briefs on the Law of Insurance, vol. 1, pp. 72-77.

do not see how the court fell into such an error, for the plain provisions of the policy show clearly that it was for the benefit of the plaintiff, for it expressly provides that at the end of 20 years the policy is payable to himself if living, and after 10 years he could share in the company's surplus, according to usage, at each distribution, until all contributions to the surplus funds, found in the course of making such contributions to have arisen from the policy, should have been returned. After three or more annual premiums were paid in cash, if he made default in the payment of any premium on the day it became due, he was entitled to a paid-up nonparticipating policy for as many twentieth parts of the original sum insured as there were complete annual premiums so paid. There were also other benefits which he would receive, which we need not further specify particularly. But, notwithstanding the wrong reason given by the trial court for its decision, if the decision was correct, it must stand.

The question of the proper construction of contracts between an infant and an adult is frequently one of great difficulty. The power which exists upon the part of an infant to insist upon the performance of a contract which is for his benefit and to repudiate one which is against his interest necessarily results in this condition of affairs, and the only method for courts to deal with such questions is to apply so far as possible the legal or equitable rules to each case as it may present itself for judicial determination. The infirmities which are always attendant upon infancy are so many, and present themselves in so many different phases, that the law must necessarily throw its protection around them, and allow them to avoid acts which are obviously injurious, and which are brought about by their own imprudent conduct, or by the evil designs of others. But there are contracts made by infants which are valid and binding upon them, such as contracts for necessities. It is conceded, however, that this contract is not one coming within the term "necessaries," and it must also be conceded that there was no fraud on the part of the defendant whereby the plaintiff was induced to enter into this contract of insurance. Nor does the question of delay on the part of plaintiff in disaffirming this contract enter into the case for discussion or for determination. If he had a right to disaffirm the contract at all, it was done promptly, and without delay, after he attained his majority.

Was this contract void or voidable? We are of the opinion that it was not void. It was for the benefit of the infant. That is to say, construing it in accordance with the well-understood business principles and practical experience of the age, it should be deemed one beneficial to him. Like all business ventures, even among adults, it might prove disastrous or it might be of benefit to the plaintiff. It was the ordinary policy of insurance upon the usual terms, and in a solvent company. At least no suggestion is made to the contrary. Was the policy voidable, and, if so, was it of that character which would not only permit the plaintiff to defend against the collection of

anything further on the policy, but, by reason of his infancy, entitle him, when arriving at his majority, to collect back whatever he had paid while an infant? We are of the opinion that the contract was voidable. Even if the contract was beneficial to him while he was an infant, in the sense that if he retained it there might be certain contingencies which would arise whereby he would be entitled to receive the actual benefits mentioned in the policy, yet he does not seek to retain the policy, or claim any actual benefits under its terms, either at present or in the future. All that he could return or surrender up he offered to do at the very earliest opportunity after arriving at full age. He has secured no money or property under it or by virtue of its terms, and no consideration other than the contingent one which we have mentioned. He has not squandered anything which he has received from defendant. He retains nothing either of actual value or any right. In no way has he appropriated any of the fruits of the contract to his own advantage, nor does he seek to do so. The defendant has had the use of the money paid it for several years. As between the two parties, the defendant so far has profited by the contract. If the plaintiff succeeds in this action, the defendant suffers no loss or damage except to return to plaintiff just what it got of him while an infant.

It did not obtain the money of the plaintiff, it is true, through deceit, fraud, or concealment of any fact, nor in any way impose upon the infant, but it did obtain and receive a fund belonging to him which it was not necessary for him to part with. This was done at a time when the law adjudges him incapable of determining whether it was for his benefit or not. To leave this question of making contracts to the immature judgment of infants who are easily influenced or misled, and frequently to their great injury, and then have the courts continually called upon to decide whether the contract was of such a beneficial nature to the infant that it might be enforced against him, would lead to an endless variety of decisions. The interest of the infant will be best subserved by holding such contracts voidable. It is a rule which can be appropriately applied in this case, for the plaintiff has performed all that can be reasonably asked of him to do. We have examined many of the authorities cited by the counsel for the appellant in their brief, but we are of the opinion that the rule heretofore laid down in this court is the correct one to follow, and is applicable to this case. *Miller v. Smith*, 26 Minn. 248, 2 N. W. 942, 37 Am. Rep. 407; *Conrad v. Lane*, 26 Minn. 389, 4 N. W. 696, 37 Am. Rep. 412. The order appealed from is affirmed.

On Rehearing.

MITCHELL, J.⁶ This case was argued and decided at the last term of this court. 56 Minn. 365, 57 N. W. 934, 26 L. R. A. 187, 45 Am.

⁶ Part of the opinion of Mitchell, J., on rehearing, is omitted.

St. Rep. 473. A reargument was granted for the reasons that although the amount was small the legal principles involved were very important; the time permitted for argument under our rules was brief; the case was decided near the end of the term, without, perhaps, the degree of consideration that its importance demanded; and, on further reflection, we are not satisfied that our decision was correct.

The former opinion laid down the following propositions, to which we still adhere: (1) That the contract of insurance was of benefit to the infant himself, and was not a contract for the benefit of third parties. (2) The contract, so far as appears on its face, was the usual and ordinary one for life insurance, on the customary terms, and was a fair and reasonable one, and free from any fraud, unfairness, or undue influence on part of the defendant, unless the contrary is to be presumed from the fact that it was made with the infant.

It is not correct, however, to say that the plaintiff has received no benefit from the contract, or that the defendant has parted with nothing of value under it. True, the plaintiff has received no money, and the defendant has paid none to the plaintiff; but the life of the former was insured for four years, and if he died during that time the defendant would have had to pay the amount of the policy to his estate. The defendant carried the risk all that time, and this is the essence of the contract of insurance. Neither does it follow that the risk has cost the defendant nothing in money because plaintiff himself was not one of those insured who died. The case is therefore one of a voidable or rescindable contract of an infant, partly performed on both sides, the benefits of which the infant has enjoyed, but which he cannot return, and where there is no charge of fraud, unfairness, or undue influence on the part of the other party, unless, as already suggested, it is to be presumed from the fact that the contract was made with an infant.

The question is, can the plaintiff recover back what he has paid, assuming that the contract was in all respects fair and reasonable? The opinion heretofore filed held that he can. Without taking time to cite or discuss any of our former decisions, it is sufficient to say that none of them commit this court to such a doctrine. That such a rule goes further than is necessary for the protection of the infant, and would often work gross injustice to those dealing with him, is, to our minds, clear. Suppose a minor engaged in agriculture should hire a man to work on his farm, and pay him reasonable wages for his services. According to this rule the minor might recover back what he paid, although retaining and enjoying the fruits of the other man's labor. Or, again, suppose a man engaged in mercantile business, with a capital of \$5,000, should, from time to time, buy and pay for \$100,000 worth of goods, in the aggregate, which he had sold, and got his pay. According to this doctrine, he could recover back the \$100,000 which he had paid to the various parties from whom he had bought the goods. Not only would such a rule work great injustice to others,

but it would be positively injurious to the infant himself. The policy of the law is to shield or protect the infant, and not to debar him from the privilege of contracting.

But, if the rule suggested is to obtain, there is no footing on which an adult can deal with him, except for necessities. Nobody could or would do any business with him. He could not get his life insured. He could not insure his property against fire. He could not hire servants to till his farm. He could not improve or keep up his land or buildings. In short, however advantageous other contracts might be to him, or however much capital he might have, he could do absolutely nothing, except to buy necessities, because nobody would dare to contract with him for anything else. It cannot be that this is the law. Certainly, it ought not to be.

The following propositions are well settled, everywhere, as to the rescindable contracts of an infant, and in that category we include all contracts except for necessities:

First. That, in so far as a contract is executory on part of an infant, he may always interpose his infancy as a defense to an action for its enforcement. He can always use his infancy as a shield.

Second. If the contract has been wholly or partly performed on his part, but is wholly executory on part of the other party, the minor therefore having received no benefits from it, he may recover back what he has paid or parted with.

Third. Where the contract has been wholly or partly performed on both sides, the infant may always rescind, and recover back what he has paid, upon restoring what he has received.

Fourth. A minor, on arriving at full age, may avoid a conveyance of his real estate without being required to place the grantee in statu quo, although a different rule has sometimes been adopted by courts of equity when the former infant has applied to them for aid in avoiding his deeds. Whether this distinction between conveyances of real property and personal contracts is founded on a technical rule, or upon considerations of policy growing out of the difference between real and personal property, it is not necessary here to consider.

Fifth. Where the contract has been wholly or partly performed on both sides, the infant, if he sues to recover back what he has paid, must always restore what he has received, in so far as he still retains it in specie.

Sixth. The courts will always grant an infant relief where the other party has been guilty of fraud or undue influence. As to what would constitute a sufficient ground for relief under this head, and what relief the courts would grant in such cases, we will refer to hereafter.

But suppose that the contract is free from all elements of fraud, unfairness, or overreaching, and the infant has enjoyed the benefits of it, but has spent or disposed of what he has received, or the benefits received are, as in this case, of such a nature that they cannot

be restored. Can he recover back what he has paid? It is well settled in England that he cannot. * * *

At least a respectable minority of the American decisions are in full accord with what we have termed the "English rule." See, among others, *Riley v. Mallory*, 33 Conn. 206; *Adams v. Beall*, 67 Md. 53, 8 Atl. 664, 1 Am. St. Rep. 379; *Breed v. Judd*, 1 Gray (Mass.) 455. But many—perhaps a majority—of the American decisions, apparently thinking that the English rule does not sufficiently protect the infant, have modified it; and some of them seem to have wholly repudiated it, and to hold that although the contract was in all respects fair and reasonable, and the infant had enjoyed the benefits of it, yet if the infant had spent or parted with what he had received, or if the benefits of it were of such a nature that they could not be restored, still he might recover back what he had paid. The problem with the courts seems to have been, on the one hand, to protect the infant from the improvidence incident to his youth and inexperience, and how, on the other hand, to compel him to conform to the principles of common honesty. The result is that the American authorities—at least the later ones—have fallen into such a condition of conflict and confusion that it is difficult to draw from them any definite or uniform rule. * * *

Our conclusion is that where the personal contract of an infant, beneficial to himself, has been wholly or partly executed on both sides, but the infant has disposed of what he has received, or the benefits recovered by him are such that they cannot be restored, he cannot recover back what he has paid, if the contract was a fair and reasonable one, and free from any fraud or bad faith on part of the other party, but that the burden is on the other party to prove that such was the character of the contract; that, if the contract involved the element of actual fraud or bad faith, the infant may recover all he paid or parted with, but if the contract involved no such elements, and was otherwise reasonable and fair, except that what the infant paid was in excess of the value of what he received, his recovery should be limited to such excess. It seems to us that this will sufficiently protect the infant, and at the same time do justice to the other party. Of course, in speaking of contracts beneficial to the infant, we refer to those that are deemed such in contemplation of law.

Applying these rules to the case in hand, we add that life insurance in a solvent company, at the ordinary and usual rates, for an amount reasonably commensurate with the infant's estate, or his financial ability to carry it, is a provident, fair, and reasonable contract, and one which it is entirely proper for an insurance company to make with him, assuming that it practices no fraud or other unlawful means to secure it; and if such should appear to be the character of this contract the plaintiff could not recover the premiums which he has paid in, so far as they were intended to cover the current annual risk assumed by the company under its policy.

But it appears from the face of the policy that these premiums covered something more than this. The policy provides that after payment of three or more annual premiums the insured will be entitled to a paid-up, nonparticipating policy for as many twentieths of the original sum insured (\$1,000) as there have been annual premiums so paid. The complaint alleges the payment of four annual premiums. Hence, the plaintiff was entitled, upon surrender of the original policy, to a paid-up, nonparticipating policy for \$200; and it therefore seems to us that, having elected to rescind, he was entitled to recover back, in any event, the present cash "surrender" value of such a policy. For this reason, as well as that the burden was on the defendant to prove the fair and honest character of the contract, the demurrer to the complaint was properly overruled. The result arrived at in the former opinion was therefore correct, and is adhered to, although on somewhat different grounds. Order affirmed.⁷

SIMPSON v. PRUDENTIAL INS. CO. OF AMERICA.

(Supreme Judicial Court of Massachusetts, 1903. 184 Mass. 348, 68 N. E. 673, 63 L. R. A. 741, 100 Am. St. Rep. 560.)

Action by one Simpson, by her next friend, against the Prudential Insurance Company of America. From a judgment for defendant, plaintiff appeals.

MORTON, J.⁸ The plaintiff in this case is a minor, and brings this action, by her next friend, to recover the premiums paid by her on a life insurance policy issued to her by the defendant. The case was heard upon agreed facts, and judgment was ordered for the defendant, and the plaintiff appealed.

The policy was what is termed a 20-year endowment policy, for \$500; and the agreed facts state that there was no fraud or undue influence practiced upon the plaintiff by the defendant or its agents, and that the contract was a reasonable and prudent one for a person in the plaintiff's situation and condition in life. Before the action was brought, the plaintiff, through her attorney, had notified the defendant that she repudiated the policy and the contract contained in it, and demanded a return of the sums she had paid as premiums. The premiums paid amounted to \$54, and it is agreed that the expense to the defendant of keeping the policy in force was \$28.72. The defendant contends that this should be deducted from, or set off against, the premiums, if the plaintiff is allowed to recover for them.

It is manifest, we think, that, however reasonable and prudent it

⁷ The proper measure of recovery is the reserve value of the policy—not the "surrender" value. The surrender value is usually fixed by the insurer at an amount less than the real value of the policy.

⁸ Part of the opinion is omitted.

may be for an infant to take out a policy of life insurance, it does not come within the class of necessities, or within the class of contracts which have been held, as matter of law, to be beneficial to, and therefore binding upon, an infant. It is only when the contract comes within the class of contracts which, as matter of law, are binding upon an infant, that the question of its reasonableness and prudence is material. *Tupper v. Cadwell*, 12 Metc. 559, 46 Am. Dec. 704.

The defendant contends that this contract having been executed, in part, at least, the plaintiff cannot recover without making the defendant whole for the expense to which it has been subjected. But that would be compelling the plaintiff to carry out, to that extent, a contract which is not binding on her, and which she may avoid. *Morse v. Ely*, 154 Mass. 458, 28 N. E. 577, 26 Am. St. Rep. 263.

It is well settled in this commonwealth, whatever may be the law elsewhere, that, in order to avoid a contract, an infant is not obliged to put the other party in statu quo. *Gillis v. Goodwin*, 180 Mass. 140, 61 N. E. 813, 91 Am. St. Rep. 265, and cases cited; *White v. New Bedford Cot. Waste Corp.*, 178 Mass. 20, 59 N. E. 642. * * * Judgment reversed, and judgment for the plaintiff.⁹

⁹ That a contract of fire insurance is not a contract for necessities, see *New Hampshire Mut. Fire Ins. Co. v. Noyes*, 32 N. H. 345 (1855). Compare *Monaghan v. Insurance Co.*, 53 Mich. 238, 18 N. W. 797 (1884). See, also, *O'Rourke v. John Hancock Mut. Life Ins. Co.*, 23 R. I. 457, 50 Atl. 834, 57 L. R. A. 496, 91 Am. St. Rep. 643 (1902), wherein it is held that a breach of warranty is no defense to an action on a policy of insurance granted to an infant.

INSURABLE INTEREST

I. General Theory of Insurable Interest¹

CLINTON v. NORFOLK MUT. FIRE INS. CO.

(Supreme Judicial Court of Massachusetts, 1900. 176 Mass. 486, 57 N. E. 998.
50 L. R. A. 833, 79 Am. St. Rep. 325.)

Action by one Clinton against the Norfolk Mutual Fire Insurance Company on a policy of insurance. There was a judgment for defendant on agreed facts, and plaintiff appeals.

HAMMOND, J.² By his deed to Forbes the plaintiff conveyed all his interest in the buildings insured, except an estate for his life in the house. This life estate was carved out of the fee previously owned by him, and was held by the same title as before the conveyance. He sold his entire interest in the barn, but only part of his interest in the house. The only question is whether the policy was thereby avoided as to his remaining interest in the house.

The defendant contends that the policy is thus avoided, and relies upon the clauses which provide that it shall be void if, without the consent of the defendant, "the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risks," or "the said property shall be sold."

So far as respects the change of circumstances or situation nothing appears except the deed to Forbes. The burden of proof to show a breach of condition of a policy which has once attached is on the defendant (*Orrell v. Insurance Co.*, 13 Gray, 431); and, even if the clause has reference to what are sometimes called the moral elements of the risk, we cannot say, upon the facts appearing before us, that the risk was increased by the sale, or that the clause was intended to embrace the changes made by a sale, especially when there is an express provision in the policy relating to that subject. *Powers v. Insurance Co.*, 136 Mass. 108, 49 Am. Rep. 20. Compare, also, *Oakes v. Insurance Co.*, 131 Mass. 164.

The defense must, therefore, rest upon the clause as to alienation. Many of the earlier policies of fire insurance contained no condition against alienation. Inasmuch, however, as the contract of insurance is one of indemnity, and not a wager, it is manifest that where, be-

¹ For discussion of principles, see *Vance on Insurance*, § 46. See, also, *Cooley, Briefs on the Law of Insurance*, vol. 1, pp. 132-243.

² Part of the opinion is omitted.

fore the fire, the insured had parted with his entire interest in the property insured, he suffered no loss by its destruction, and needed no indemnity. A total transfer of his interest, therefore, defeated the policy. But any change short of a complete transfer of his entire interest did not have that effect. The general rule was and is that, in the absence of any provision to the contrary in the policy, any change in the insurable interest of the insured, whether by a complete sale of only a part of the property or a change in the title to a part or the whole of the property, does not avoid the policy which has once attached, provided that at the time of the loss the insured has an insurable interest. It is necessary that there should be an insurable interest at the time of the contract and at the time of the loss; but if, at the time of the loss, the insured has parted with only a part of his interest, the policy is valid as to the part retained. *Lazarus v. Insurance Co.*, 5 Pick. 76; *Scanlon v. Insurance Co.*, 4 Biss. 511, Fed. Cas. No. 12,436; *Cowan v. Insurance Co.*, 40 Iowa, 551, 20 Am. Rep. 583; *Stetson v. Insurance Co.*, 4 Mass. 330, 3 Am. Dec. 217; *Ayers v. Insurance Co.*, 17 Iowa, 176, 85 Am. Dec. 553; *Hitchcock v. Insurance Co.*, 26 N. Y. 68. And see, further, the cases cited in 13 Am. & Eng. Enc. Law (2d Ed.) p. 240, and notes. And even a total alienation does not avoid, but only suspends, the policy; so that, if the insured regains his interest, or any part of it, and holds it at the time of the loss, he may recover. *May, Ins.* 101; *Worthington v. Bearse*, 12 Allen, 382, 90 Am. Dec. 152.

In this state of the law, insurers began to insert in the policies clauses relating to alienation. These clauses vary in language, and in the examination of the cases on this subject considerable care must be exercised in order to discriminate properly between those cases applicable and those not applicable to the clause which may be under consideration.

The clause in this policy is, "if the said property be sold." Conditions of this kind are strictly construed against the insured, and the general rule is that such a condition refers only to an absolute transfer of the entire interest of the insured, completely divesting him of his insurable interest. Any sale or transfer short of this is not within the scope of the condition. See, in addition to the cases above cited, *Bryan v. Insurance Co.*, 145 Mass. 389, 14 N. E. 454; *Holbrook v. Insurance Co.*, 1 Curt. 193, Fed. Cas. No. 6,589; *Power v. Insurance Co.*, 19 La. 28, 36 Am. Dec. 665; and the cases collected in 13 Am. & Eng. Enc. Law (2d Ed.) p. 241, and notes.

If it be the intention of the insurers that the contract should be avoided by any partial sale, or by any change short of an absolute sale, of the entire interest, there is no difficulty in expressing that intent in plain and explicit language; and in many policies such an intention is thus expressed. See *Oakes v. Insurance Co.*, *ubi supra*, where the condition was that the policy should be void if the property insured should be sold or conveyed in whole or in part.

As an illustration of the different results arising from the difference in the language of the clauses as to alienation, compare the case of *Foot v. Insurance Co.*, 119 Mass. 259, and *Bryan v. Insurance Co.*, *ubi supra*. In the former case, where the condition was that the policy should be void if any change should take place in the title or possession of the property insured, whether by sale, transfer, or conveyance, legal process, or judicial decree, it was held that a mortgage by way of an absolute deed, and an unrecorded instrument of defeasance back, was a violation of the condition; while in the latter case it was held that such a mortgage did not avoid the policy where the condition was that the policy should be avoided "if the property should be sold."

If, therefore, the house had been the only building named in the policy, or if the policy can be regarded as containing two separate and independent contracts, one applicable to the house alone and one applicable to the barn alone, there was no breach of the condition of alienation so far as respects the house, and the policy was valid as to the life estate of the plaintiff therein at the time of the loss. *Clark v. Insurance Co.*, 6 Cush. 342, 53 Am. Dec. 44.

But it is contended by the defendant that the contract was entire, and that, being void as to the barn, it is void as to the house. And the counsel for the defendant argues that, in so far as the case of *Clark v. Insurance Co.*, *ubi supra*, seems to support the doctrine that, where the different articles are separately valued in a policy, it is to be regarded as containing a separate, distinct, and independent contract as to each such article, as though each was insured in a separate policy, it is inconsistent with *Brown v. Insurance Co.*, 11 Cush. 280, and *Thomas v. Assurance Co.*, 162 Mass. 29, 37 N. E. 672, 44 Am. St. Rep. 323, and other similar cases decided here and elsewhere. We have not found it necessary, however, to consider whether or not the contract in this case is an entire contract, since we are of the opinion that, even if it be entire, there has been no breach of the condition. If the contract was entire, then the house and barn were insured as one entire risk, and the same considerations which lead to the conclusion that, where the house is the only building insured, there is no sale, within the condition named in the policy, when the insured retains an insurable interest in the house, leads also to the conclusion that, where the house and barn are insured as one entire risk, there is no sale of the property within the condition when the insured retains an insurable interest in either building. In either case there has not been an absolute sale of the entire interest in the whole property, and consequently no breach of the condition. And the reason the plaintiff cannot recover for the destruction of the barn is not because there has been a breach of the condition as to alienation, and the policy has, therefore, become void, but because he had no insurable interest in the barn when it was burned, and has, therefore, suffered no loss by its destruction. The result would be the same

even if there was no condition whatever as to alienation, or if the plaintiff had lost his interest in some other way not covered by the condition. * * * Judgment for plaintiff.³

II. Insurable Interest in Property—What Constitutes ⁴

CARPENTER v. GERMAN-AMERICAN INS. CO.

(Court of Appeals of New York, 1892. 135 N. Y. 298, 31 N. E. 1015.)

Action by George C. Carpenter and another against the German-American Insurance Company. A judgment for plaintiffs was affirmed by the General Term (61 Hun, 624, 17 N. Y. Supp. 603, mem.), and defendant appeals.

ANDREWS, J.⁵ * * * The remaining question relates to the claim that the plaintiff, at the time of the insurance and of the fire, had no insurable interest in the building which was in part the subject of the insurance. It is doubtless true that the State Bank of Elizabeth, the vendor in the contract of sale to the plaintiffs, had no legal title to the property embraced therein. It was, however, the beneficial owner. The bank owned the mortgage and bid off the property on the foreclosure in 1877, but its agent at the sale, under advice of its attorney, directed the conveyance to be made to Mr. Kean, the president of the bank, because of the statute of Pennsylvania which prohibited any foreign corporation from acquiring and holding any real estate within the commonwealth, "directly in the corporate name, or by or through any trustee or other devise whatever, unless specially authorized to hold such property by the laws of the commonwealth." *Purd. Dig. (Pa.)* § 56, p. 292. Mr. Kean paid nothing for the property, and acknowledged that it belonged to the bank, and never made any claim to it whatever. He knew of the negotiation between the bank and Carpenter for the sale and purchase of the property, and advised and consented to the contract by the bank, and was fully acquainted with the fact that Carpenter was paying the purchase money of the land, in reliance upon the ownership of the property by the bank. The bank, Carpenter, and Kean acted in good faith, supposing that the bank held the legal title to the land. The officers of the bank had forgotten that the title had been taken in Kean's name, and

³ Duration of interest, see post, p. 77. As to divisibility of contract, see ante, p. 36.

⁴ For discussion of principles, see *Vance on Insurance*, § 47.

⁵ Part of the opinion is omitted.

for this reason the contract with Carpenter was made in the name of the corporation.

We deem it unnecessary to go into the abstruse questions which have been argued at the bar as to the legal and equitable right to the land, as between the bank and Kean, growing out of the conveyance to the latter of the legal title on the foreclosure sale. Assuming (but without deciding) that the bank could not, in view of the Pennsylvania statute, have established a trust in its favor, enforceable against Kean, or compelled him to convey the legal title to the corporation, yet it is, we think, very plain that, as between Carpenter on the one side, and the bank and Kean on the other, Carpenter, on the performance of his contract, could have maintained a suit in equity to compel the bank and Kean to convey the land. Kean would be bound by the plainest principles of equity and justice to make the contract good, which was entered into with his advice, and upon which Carpenter had advanced his money. It would be no answer that Kean did not act *mala fide*, but supposed that the legal title was in the bank. He stood by and encouraged the sale, and knew of the payment of the purchase money by Carpenter in reliance upon the right of the bank to sell the property. *Storrs v. Barker*, 6 Johns. Ch. 166, 10 Am. Dec. 316; *Continental Nat. Bank v. National Bank of Commonwealth*, 50 N. Y. 576; *Thompson v. Simpson*, 128 N. Y. 270, 28 N. E. 627. His mistake prejudiced no real right or equity in the land. He asserted none therein, and now acknowledges that the bank is entitled to the benefit of the policy. The principle of equitable estoppel applies with persuasive force against Kean, preventing him from asserting, as against Carpenter, any right in the land; and a court of equity would require him to convey, so that the just expectations of Carpenter should not be disappointed. Carpenter had, therefore, an insurable interest in the property.

The questions decided dispose of all the material points in the appeal. The result is that the judgment should be affirmed, with costs. All concur.

BASSETT v. FARMERS' & MERCHANTS' INS. CO.

(Supreme Court of Nebraska, 1909. 85 Neb. 85, 122 N. W. 703.)

Action by John W. Bassett against the Farmers' & Merchants' Insurance Company. Judgment for plaintiff, and defendant appeals.

Root, J.* In 1902 John W. Bassett, plaintiff herein, purchased a farm in Otoe county, and procured the conveyance therefor to be made to his wife. In 1904 defendant insured plaintiff for five years against loss by fire of the dwelling house on said farm. In 1906 the house was totally destroyed by fire. Defendant denied liability upon its policy, and returned the premium received by it from plaintiff, which

* Part of the opinion is omitted.

he retained some months, and then sent back to defendant. Defendant tenders plaintiff the amount of said premium.

The most important question raised by the defense is that under the facts plaintiff did not have an insurable interest in the property destroyed, and for that reason cannot recover. Without an insurable interest, plaintiff ought not to prevail. *Stanisics v. Hartford Fire Ins. Co.*, 83 Neb. 768, 120 N. W. 435. At the time the policy was issued excepting only her homestead, a married woman in Nebraska could dispose of her real estate without her husband's assent, and by her sole deed convey title thereto freed from his interest inchoate or otherwise therein. The farm under consideration was not a homestead. Not only may the wife thus convey her real estate, but during her lifetime the husband has no right to its possession or control nor to any part of the rents and profits issuing therefrom. Cases may be cited to sustain the proposition that the husband's estate by the curtesy initiate is an insurable interest; but an examination of those cases will disclose that they are based upon laws giving the husband more than a mere expectancy in the wife's land. In jurisdictions where the lawmaking power has completely emancipated a married woman's property from the control of her husband, the possibility that he will receive a benefit from the real estate of which she may die seised is not considered an insurable interest during her lifetime. *Clark v. Insurance Co.*, 81 Me. 373, 17 Atl. 303; *Traders' Insurance Co. v. Newman*, 120 Ind. 554, 22 N. E. 428; *Planters' Ins. Co. v. Loyd*, 71 Ark. 292, 75 S. W. 725.

Plaintiff argues that, if the holder of the property insured will suffer a loss by its destruction, he has an insurable interest therein. An examination of the cases cited upon that point will disclose that the assured in each instance had some substantial interest in the subject insured, an interest that would be recognized and protected by the courts. If plaintiff were enjoying the possession of a house rent free without any contract with the owner and under such circumstances that the latter might dispossess the former any time, it would hardly be contended that he had an insurable interest in the dwelling. So far as the proof goes, plaintiff holds possession of the farm by sufferance of his wife, and not by force of any lawful or equitable right. Counsel argue that Mrs. Bassett has only a dry, naked, legal title to the farm, and that the beneficial one is in plaintiff, but the difficulty is that the proof does not sustain that assumption. Mrs. Bassett did not testify, nor has plaintiff stated, that there was any arrangement between himself and wife, oral or otherwise, by which he was to have a life estate in the farm. Nor is there any proof that the deed to Mrs. Bassett does not convey the title in just such form as plaintiff desired.

In *Redfield v. Holland Purchase Ins. Co.*, 56 N. Y. 354, 15 Am. Rep. 424, cited as in point, the wife had agreed orally that her husband should have the use during his natural life of the property con-

veyed to her at his instance. He was in possession of the land, and the court held that there had been complete performance by the husband of the oral agreement so as to take it out of the statute of frauds, and that he had an equitable title to the real estate. But in the case at bar the proof merely discloses that plaintiff purchased the land and directed the vendor to convey direct to his wife, and, in conformity with his instructions, she received a warranty deed therefor. He testified that he desired her to have the land without administration if she survived him, and, should she predecease him, he would inherit from her. It may be that the facts will justify a court finding that there was an arrangement between the husband and wife entered into before the deed was made to her that he could have the use of the land during his lifetime, but there is no evidence in the record of those facts. Upon the proof plaintiff is in the same situation as though he had taken possession of his wife's separate property and leased it for his own benefit. The wife could oust him any time she saw fit. In the state of the record there is a failure of proof upon a vital fact in issue. *Pope v. Glens Falls Ins. Co.*, 136 Ala. 670, 34 South. 29.
* * * Judgment reversed.

RIGGS v. COMMERCIAL MUT. INS. CO.

(Court of Appeals of New York, 1890. 125 N. Y. 7, 25 N. E. 1058, 10 L. R. A. 684, 21 Am. St. Rep. 716.)

Action by John S. Riggs against the Commercial Mutual Insurance Company. Plaintiff sues as assignee of a policy of insurance issued by the defendant to J. L. Tobias on the steamer *Falcon*. Tobias was at the time of issuance of the policy a stockholder in the Merchants' Steamship Company, a corporation which owned the vessel insured. A judgment for plaintiff being affirmed by the superior court of New York City, general term (5 N. Y. Supp. 183), the defendant appeals.

ANDREWS, J.⁷ * * * The question whether a stockholder in a corporation, as such, has an insurable interest in the corporate property, which he may protect by an insurance of specific, tangible property of the corporation, is the question now presented. The policy does not disclose the nature of the interest of Tobias in the vessel insured; but this was not necessary, unless required by some condition in the policy. *Lawrence v. Van Horne*, 1 Caines, 276; *Tyler v. Insurance Co.*, 12 Wend. 507. The policy, if otherwise valid, attached to whatever insurable interest he had, whether as owner or otherwise. What constitutes an insurable interest has been the subject of much discussion in the cases, and is often a question of great difficulty. It is quite apparent that the tendency of decisions in recent times is in the direction of a more liberal doctrine upon this subject than formerly prevailed. May, Ins. § 76.

⁷ Part of the opinion is omitted and the statement of facts is rewritten.

Contracts of insurance where the insured had no interest were permitted at common law (*Craufurd v. Hunter*, 8 Term R. 13); but the manifest evils attending such contracts, and the temptation which they afforded for fraud and crime, led to the enactment in England of the statute 19 Geo. II. c. 37, prohibiting wager policies, and this was followed by the enactment in this state of a similar statute (1 Rev. St. [1st Ed.] p. 662) prohibiting wagers. But to prevent the application of the statute to cases of insurance by way of security and indemnity it was provided that it should "not be extended so as to prohibit or in any way affect any insurances made in good faith for the security or indemnity of the party insured, and which are not otherwise prohibited by law." Section 10. It would seem, therefore, that whenever there is a real interest to protect, and a person is so situated with respect to the subject of insurance that its destruction would or might reasonably be expected to impair the value of that interest, an insurance on such interest would not be a wager within the statute, whether the interest was an ownership in or a right to the possession of the property, or simply an advantage of a pecuniary character, having a legal basis, but dependent upon the continued existence of the subject. It is well settled that a mere hope or expectation, which may be frustrated by the happening of some event, is not an insurable interest.

The stockholder in a corporation has no legal title to the corporate assets or property, nor any equitable title which he can convert into a legal title. The corporation itself is the legal owner, and can deal with corporate property as owner, subject only to the restrictions of the charter. *Plimpton v. Bigelow*, 93 N. Y. 593; *Van Allen v. Assessors*, 3 Wall. 573, 18 L. Ed. 229. But stockholders in a corporation have equitable rights of a pecuniary nature, growing out of their situation as stockholders, which may be prejudiced by the destruction of the corporate property. The object of business corporations is to make profits through the exercise of the corporate franchises, and gains so made are distributable among the stockholders according to their respective interests, although the time of the division is ordinarily in the discretion of the managing body. It is this right to share in the profits which constitutes the inducement to become stockholders. So, also, on the winding up of the corporation, the assets, after payment of debts, are divisible among the stockholders. It is very plain that both these rights of stockholders—viz., the right to dividends and the right to share in the final distribution of the corporate property—may be prejudiced by its destruction. In this case the ships were the means by which profits were to be earned, and their loss would naturally, in the ordinary course of things, diminish the capacity of the corporation to pay dividends, and consequently impair the value of the stock. The same would be true in other cases which might be mentioned; as, for example, where buildings producing rent, owned by a corporation, should be burned. It is not necessary, to constitute an insurable in-

terest, that the interest is such that the event insured against would necessarily subject the insured to loss. It is sufficient that it might do so, and that pecuniary injury would be the natural consequence. *Cone v. Insurance Co.*, 60 N. Y. 619.

The question now before us was considered by the supreme court of Iowa in the case of *Warren v. Insurance Co.*, 31 Iowa, 464, 7 Am. Rep. 160. The court, in a careful opinion, reached the conclusion that a stockholder in a corporation had an insurable interest in the corporate property. In *Philips v. Insurance Co.*, 20 Ohio, 174, there is an adverse dictum, but the decision went on another ground. In *Wilson v. Jones*, L. R. 2 Exch. 139, the action was upon a policy in favor of the plaintiff, a shareholder in the Atlantic Telegraph Company, a company organized to lay the Atlantic cable. The court construed the contract as an insurance of the plaintiff in respect to the adventure undertaken by the company to lay the cable, and it was held that his interest as shareholder was an insurable interest, and likened it to an insurance on profits. See, also, *Paterson v. Harres*, 1 Best & S. 336. It is difficult to perceive any good reason why, if a stockholder could be insured on his shares in a corporation against a loss happening in the prosecution of a corporate enterprise, he could not insure specifically the corporate property itself embraced in the adventure, and prove his interest by showing that he was a shareholder.

The question here is, did the plaintiff have an insurable interest covered by the policy? The amount of damages is not in question. Except that the parties have taken that question out of the controversy, the extent of the loss would be a question of fact to be ascertained by proof, and the recovery up to the amount insured would be measured by the actual loss. We are of opinion that the view that a stockholder in a corporation may insure specific corporate property by reason of his situation as stockholder, stands upon the better reason, and also that it is in consonance with the current of authority defining insurable interests in our courts. The cases of *Herkimer v. Rice*, 27 N. Y. 163, *Rohrback v. Insurance Co.*, 62 N. Y. 47, 20 Am. Rep. 451, and *National Filtering Oil Co. v. Citizens' Ins. Co.*, 106 N. Y. 535, 13 N. E. 337, 60 Am. Rep. 473, sustained policies upon interests quite as remote as the interest now in question. It would be useless reiteration to restate the particular facts and grounds of the decisions in these cases. It is sufficient to refer to them, and to say in conclusion that it seems to us, both upon authority and reason, that the insurance now in question is not a wager policy, but is a fair and reasonable contract of indemnity, founded upon a real interest, though not amounting to an estate, legal or equitable, in the property insured.

The judgment should therefore be affirmed. All concur.*

* Accord: *Warren v. Davenport Fire Ins. Co.*, 31 Iowa, 464, 7 Am. Rep. 160 (1871); *Blake Opera House Co. v. Home Ins. Co.*, 73 Wis. 667, 41 N. W. 968 (1889); *Ætna Ins. Co. v. Kennedy*, 161 Ala. 600, 50 South. 73, 135 Am. St. Rep. 160 (1909).

III. Duration of Interest •

DICKERMAN v. VERMONT MUT. FIRE INS. CO.

(Supreme Court of Vermont, 1894. 67 Vt. 99, 30 Atl. 808.)

Assumpsit by Lewis Dickerman and another against the Vermont Mutual Fire Insurance Company and against the Union Mutual Fire Insurance Company to recover on a policy of fire insurance. Defendants demurred to plaintiffs' declarations. Demurrers overruled, and defendants except.

ROWELL, J. The questions in these cases being the same, they were heard together. The statement in the counts demurred to, that the policies and applications are referred to and made a part thereof, does not, as is conceded, make those instruments a part of the counts. It is essential to the sufficiency of the counts that they should allege an insurable interest in the plaintiffs at the time the policies were issued, and also at the time of loss.

In respect to the time of issuing the policies, it is alleged that the defendants promised the plaintiffs to pay them certain sums of money named if their buildings, situate, etc., were destroyed by fire between certain dates. It is doubtful whether this is a sufficiently definite and positive allegation of insurable interest. The authorities differ about it, and it is not necessary to decide the question; for the counts are bad for not alleging such interest at the time of loss, concerning which they contain no allegation whatever.

It is also doubtful, to say the least, whether it appears from either count that the money was due and payable when the suits were commenced. It is true that the promises as laid are to pay if the buildings were destroyed, but it is not alleged that payment was to be made on the happening of that event, nor on notice of its happening, nor within a reasonable or other time thereafter, and one of the counts alleges no notices. But it is unnecessary to consider this point further, as the pleader can easily obviate this objection when he repleads.

Judgment reversed, demurrers sustained, the counts adjudged insufficient, and causes remanded.¹⁰

• For discussion of principles, see Vance on Insurance, § 48.

¹⁰ As to effect of change or termination of interest, see, also, Quarles v. Clayton, ante, p. 10, New v. German Ins. Co., ante, p. 15, and Clinton v. Norfolk Mutual Fire Ins. Co., ante, p. 68.

IV. Insurable Interest in Lives ¹¹

RUPP v. WESTERN LIFE INDEMNITY CO.

(Court of Appeals of Kentucky, 1910. 138 Ky. 18, 127 S. W. 490, 29 L. R. A. [N. S.] 675.)

NUNN, J. Appellant, Clarence Rupp, brought this suit against appellee, Western Life Indemnity Company, on two policies of insurance alleged to have been issued upon the life of his uncle, Geo. McCormack, appellant being named in both policies as the beneficiary. The petition is in two paragraphs, in each of which it is sought to recover \$1,000, the amount of each of the policies, and is in the form usually employed in bringing such actions, except it is alleged that, "by the directions and under the instructions of the assured, Geo. McCormack, the defendant issued the policies payable to this plaintiff, and this without this plaintiff's instance, request or knowledge." Appellee's answer was composed of five paragraphs; to some of which a demurrer was filed, but never acted upon as to the answer, but was carried back to and sustained as to the petition. Plaintiff declined to amend his petition, and the court dismissed it upon the ground that appellant, a nephew of McCormack, had no insurable interest in his uncle's life; that such a contract partook of the nature of a wager, and was void as being against public policy. And this is the only question necessary or proper to be considered upon this appeal.

This court has held in several cases that a person could not take out an insurance policy on the life of another, pay the premiums, and become himself the beneficiary, unless he had an insurable interest in the life of the person insured, for the reason that such would be a wagering contract, and violative of public policy. The court did not hold such contract of insurance void, but only held that the person who had no insurable interest and obtained the policy, and paid the premiums thereon, could not collect it. This, however, is not the question before us. The point is: Has a person a right to obtain a policy, pay the premiums, and name any person he wishes as beneficiary? This is the first time this question has been brought directly before this court. Appellee's counsel contend that such a policy cannot be enforced, even though the beneficiary named in the policy had nothing to do with procuring it, and was ignorant of its issual, and cite the following Kentucky cases, which they claim support their position: Caudell v. Woodward, 96 Ky. 646, 29 S. W. 614, Leaf v. Leaf,

¹¹ For discussion of principles, see Vance on Insurance, §§ 49-52. See, also, Cooley, Briefs on the Law of Insurance, vol. 1, pp. 244-329.

92 Ky. 166, 17 S. W. 354, 854, 13 Ky. Law Rep. 486, Embry's Adm'r v. Harris, 107 Ky. 65, 52 S. W. 958, 21 Ky. Law Rep. 714, Griffin's Adm'r v. Equitable Assurance Society, 119 Ky. 856, 84 S. W. 1164, 27 Ky. Law Rep. 313, and Schlamp v. Berner's Adm'r, 51 S. W. 312, 21 Ky. Law Rep. 324.

The question before us was not in issue in any of the cases cited, and was not considered, except by a slight reference in the first-styled case. The opinions in the first two cases referred to construe contracts of insurance issued by what are known as "assessment or benevolent associations," and the court decided them upon the construction of the organic law governing these associations. In the case of Embry's Adm'r v. Harris, *supra*, Harris as the surety of Embry to a bank for nearly \$4,000, obtained a policy on the life of Embry, payable to his (Embry's) estate for the sum of \$5,000, and the policy was placed in the hands of Harris to indemnify him against loss as such surety. The court upheld that contract. In the case of Schlamp, *etc.*, v. Berner's Adm'r, *supra*, Mary Berner took out a policy on her life which was made payable to her administrator. She afterwards assigned the policy to her cousin, Barbara Schlamp. The court held that Barbara Schlamp had no insurable interest in the life of Mary Berner, and took no interest in the policy by reason of the assignment of the policy to her. It will be observed that these opinions do not touch the question before us, except the Caudell Case, which we will refer to hereafter.

The exact question before us was thoroughly considered in the case of Hess' Adm'r v. Segenfelder, *etc.*, 127 Ky. 348, 105 S. W. 476, 32 Ky. Law Rep. 225, 14 L. R. A. (N. S.) 1172, 128 Am. St. Rep. 343. The policy in that case was issued by a benevolent association, and the opinion was based upon and controlled by sections 678 and 680 of the Kentucky Statutes (Russell's St. §§ 4399, 4401); but the question at bar was thoroughly considered, and the following conclusion announced: "All the courts of last resort, with possibly one exception, and the text-writers on insurance generally, are agreed that a person may take out insurance on his own life and designate whom he pleases as the beneficiary. This doctrine is based upon the sound and sensible theory that it is not reasonable to suppose that a person will insure his own life for the purposes of speculation, or be tempted to take his own life, in order to secure the payment of money to another, or designate as the beneficiary a person interested in the destruction and not in the continuance of his own life. Vance on Insurance, § 49; Heinlein v. Imperial Insurance Co., 101 Mich. 250, 59 N. W. 615, 25 L. R. A. 627, 45 Am. St. Rep. 409; Morrell v. Trenton Mutual Life Ins. Co., 10 Cush. (Mass.) 282, 57 Am. Dec. 92; Connecticut Mutual Life Insurance Co. v. Schaefer, 94 U. S. 457, 24 L. Ed. 251; May on Insurance, § 112; Bliss on Insurance, § 76; Bacon on Insurance, § 729; Beach on Insurance, § 861; Joyce on Insurance, § 729; Bloomington Mutual Benefit Association v. Blue, 120 Ill. 121, 11

N. E. 331, 60 Am. Rep. 558; *Union Fraternal League v. Walton*, 109 Ga. 1, 34 S. E. 317, 46 L. R. A. 424, 77 Am. St. Rep. 350; *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 380; *N. W. Masonic Aid Ass'n v. Jones*, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810; *Albert v. Mutual Life Ins. Co.*, 122 N. C. 92, 30 S. E. 327, 65 Am. St. Rep. 693. On the other hand, what is known as 'wagering or gambling insurance' is universally condemned, and our court, in harmony with the doctrine generally prevailing, is strongly committed to the principle that a person cannot himself procure insurance upon a life in which he has no insurable interest, growing out of kinship, dependency, or the relation of debtor and creditor, nor obtain an assignment of such insurance; nor will a person be permitted to insure his own life for the benefit of another, if that other induces him to procure the insurance and pays the premiums thereon, or there is any evidence tending to show that the insurance was obtained with a view to avoid or evade the law against speculative insurance."

This is a sound and reasonable rule, and if it were otherwise it would be in conflict with the universal doctrine that a person who is *compos mentis* can give away his property to any person he pleases; it would operate to render invalid all devises to persons not closely enough related to have an insurable interest in the life of the testator. What reason can be given warranting the declaring of an insurance policy void when a friend, a stranger in blood, is made the beneficiary by the assured, that would not apply with the same force to a testator devising property to a person not having an insurable interest in the life of the testator? Yet such devises have been universally upheld. Is it possible that a beneficiary in an insurance policy, such as is alleged in the case at bar, would have a greater desire for the premature death of the assured and take steps to produce it, than a creditor would, especially Harris, who was only the surety of Embry in the case, *supra*, and in which case the policy was upheld and declared not to be a wagering contract? In the cases of *Hill v. United Life Ins. Association*, 154 Pa. 29, 25 Atl. 771, 35 Am. St. Rep. 807, and *N. W. Masonic Aid Association v. Jones*, 154 Pa. 99, 26 Atl. 253, 35 Am. St. Rep. 810, the Supreme Court of Pennsylvania said: "A man may insure his own life, paying the premium himself, for the benefit of another, who has no insurable interest, and that such a transaction is not a wagering policy. This results from the right which a man has to dispose of his own property." The following cases also sustain this principle: *Prudential Ins. Co. v. Hunn*, 21 Ind. App. 525, 52 N. E. 772, 69 Am. St. Rep. 380, and *Scott v. Dickson*, 108 Pa. 6, 56 Am. Rep. 192. In the last-named case the identical question involved in this case was considered, and the court said: "Policies of this nature are in no sense wagering. It would be denying a man's right to do what he will with his own to say that he could not in any form insure his life for the benefit of an indigent relative, or a friend to whom he felt under obligations. And the fact

that he continues to pay the premium himself, and retains the control of the policy up to the time of his death, leaves no room for speculation or the improper practice which a few years ago brought such a scandal upon the life insurance business in this state."

It is claimed that the case of *Caudell v. Woodward*, supra, establishes a different principle. That case was decided upon the organic law of a fraternal order, but language is used in the opinion which, seemingly, sustains appellee's contention. However, the conclusion reached in the case at bar is also announced in that opinion; that is, one who obtains a policy of insurance on the life of another must have an insurable interest in the life of that other. The opinion in that case also announced the doctrine that one is prohibited from inducing another to take out insurance, or become the owner of such insurance by assignment, unless he has an insurable interest in the life of that other; and that Mrs. Woodward, a stranger, could not recover on the policy, because it is well settled that one obtaining a policy of insurance on the life of another, or who induced another to take out a policy for his benefit, must have an insurable interest. All these propositions are fundamental and sound in law. There is nowhere, however, any reason given in the *Caudell Case* why a person cannot take out insurance on his own life, pay the premiums, and make a person who is not related to him the beneficiary; nor could there have been presented any reason against it that would not have applied with equal force to a gift of the same amount by will as well.

For these reasons, the judgment of the lower court is reversed and remanded for further proceedings consistent herewith.

LIFE INS. CLEARING CO. v. O'NEILL.

(Circuit Court of Appeals of United States, Third Circuit, 1901. 106 Fed. 800, 45 C. C. A. 641, 54 L. R. A. 225.)

In Error to the Circuit Court of the United States for the Western District of Pennsylvania.

Before DALLAS and GRAY, Circuit Judges, and McPHERSON, District Judge.

J. B. McPHERSON, District Judge.¹² This is an action on a policy of insurance taken out and maintained by an adult son for his own benefit upon the life of his father, and the question for decision is whether, under the facts in evidence, the son had an insurable interest sufficient to support the policy. * * *

The uncontradicted evidence established the facts that the son was an adult, married, and having a home and family of his own apart from his father; that he was not supported by, and did not support, his father, but that each maintained himself by his own exertions.

¹² Part of the opinion is omitted.

There is nothing to show that the relation of debtor and creditor existed between them. It will be observed, therefore, that the precise question is * * * whether the bare fact of relationship is sufficient to give an adult son an insurable interest in his father's life. Upon this point, all the decisions, so far as we have been able to discover, declare that no such interest exists, although dicta to the opposite effect are no doubt to be found, and, in our opinion, this declaration is not only supported by the weight of authority, but is also in harmony with the principles upon which the doctrine of insurable interest rests.

The sum of the decisions and of text-book discussion upon the subject of insurable interest may, we think, be fairly stated thus: No person has an insurable interest in the life of another unless he would in reasonable probability suffer a pecuniary loss, or fail to make a pecuniary gain, by the other's death; or (in some jurisdictions) unless, in the discharge of some undertaking, he has spent money, or is about to spend money, for the other's support or advantage. The extent of the insurable interest—the amount for which a policy may be taken out, or for which recovery may be had—is not now under consideration. What is often called "relationship insurance" must be governed by this rule. It must rest upon the foundation of a pecuniary interest, although the interest may be contingent, and need not be capable of exact estimation in dollars and cents. Sentiment or affection is not sufficient of itself, although it may often be influential in persuading a court or jury to reach the conclusion that a beneficiary had a reasonable expectation of pecuniary advantage from the continued life of the insured. In one relation only—the relation of husband and wife—is the actual existence of such a pecuniary interest unimportant; the reason being that a real pecuniary interest is found in so great a majority of cases that the courts conclusively presume it to exist in every case, whatever the fact may be, and therefore will not inquire into the true state of a few exceptional instances. This, we think, is essentially what is meant by the declaration of courts and text-book writers that the mere relationship of husband and wife is sufficient to give an insurable interest. The supreme court of Vermont—alone, we think, among judicial tribunals—seems disposed to hold the presumption to be rebuttable. * * *

In all other relationships there is no presumption of interest, and no insurable interest exists, unless the reasonable likelihood of pecuniary loss or gain is present in actual fact. No doubt, judicial language is to be found supporting the view that the mere relationship of parent and child is sufficient to give an insurable interest. The dictum in *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924, is perhaps more often referred to than any other similar declaration. * * *

We think it cannot be doubted that the tendency of the recent decisions is to insist upon an actual or presumed pecuniary interest in

every case (although such interest may no doubt be contingent, and to some extent undefined), and to give relationship its proper place by regarding it merely as an important factor in the inquiry, whether such an interest does in reality exist. If, then, the test of pecuniary interest is to be applied to the facts of the present case, it is clear that the son had no insurable interest in his father's life. Again laying aside the effect of the poor law of Pennsylvania, it is plain that the son would lose nothing by his father's death, and would gain nothing by his father's continuance in life. His father did not support him, and he himself had not spent, nor was he about to spend, any money in his father's behalf or support. Upon principle, therefore, we think that the policy cannot be supported.

If we turn to the decided cases, the weight of authority leads to the same conclusion. We have not been referred to any case in which it is held that the mere fact of relationship between a father and his adult son is sufficient. As already stated, dicta to this effect are certainly to be found, notably in *Loomis v. Insurance Co.*, 6 Gray (Mass.) 396; *Warnock v. Davis*, supra; and *Corson's Appeal*, 113 Pa. 446, 6 Atl. 213, 57 Am. Rep. 479. But, while these expressions of opinion are entitled to much respect because of the sources from which they come, it is also true that the point was not presented for decision in these cases, and was therefore, presumably, neither argued nor specially considered. For this reason, we cannot give to such expressions the same weight that is properly given to a decision upon the very question.

The following cases deal with the insurable interest growing out of the relation of parent and child. Other citations may be found in the note to 57 Am. Dec. 96, and in May, Ins. (4th Ed.) §§ 104-107. In Illinois, the case of *Insurance Co. v. Hogan*, 80 Ill. 35, 22 Am. Rep. 180, decides that the mere relation of father and son does not give to the son an insurable interest in the life of the father, the court saying that the son must also have a well-founded or visible expectation of some pecuniary advantage to be derived from the continuance of his father's life; and the recent case of *Society v. Dyon*, 79 Ill. App. 100, repeats the ruling, that the mere relationship of father and adult son is not sufficient to give the son an insurable interest in the father's life. The point decided in *Mitchell v. Insurance Co.*, 45 Me. 105, 71 Am. Dec. 529, was that a father has an insurable interest in the life of his minor son, but the court added the dictum—which may be cited in connection with opposing expressions of opinion—that “a father, as such, has no insurable interest, resulting merely from that relation, in the life of a child of full age.” The supreme court of Indiana in *Insurance Co. v. Volger*, 89 Ind. 572, 46 Am. Rep. 185, held that a daughter has no insurable interest in the life of her mother, saying that the insurable interest in the life of another must be a pecuniary interest, and adding: “Some of the authorities tend in the direction that mere relationship, as between parent and child, is a suf-

ficient foundation upon which to rest an insurable interest, but this view is not substantiated by the weight of authority." *Wakeman v. Insurance Co.*, 30 Ont. 705, decided that a parent has a valid insurable interest in the life of a minor child. *Insurance Co. v. Brant*, 47 Mo. 419, 4 Am. Rep. 328, which was an action on a policy in favor of a wife upon the death of her husband, contains a dictum that "at common law the insurable interest in the life of another person must be a direct and definite pecuniary interest, and a person has not such an interest in the life of his wife or child merely in the character of husband or parent." In *Association v. Teewalt*, 79 Va. 423, decided in 1884, it does not appear whether the son was a minor or an adult, nor whether the son had taken out the policy on his father's life, or was merely the beneficiary in a policy taken out and maintained by the father himself. But, assuming the facts to have been as they are in the case now being considered, we cannot agree with the assertion of the supreme court of appeals of Virginia that "it is now well settled that a father has an insurable interest in the life of his child, whether a minor or of full age, and the child in the life of his father." Two cases are cited in support of this assertion, the first being *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924, in which the validity of an assignment of a life policy, made to a person having no insurable interest, was the point at issue,—the declaration concerning the interest between parent and child being merely a dictum,—and the second case being *Insurance Co. v. Luchs*, 108 U. S. 498, 2 Sup. Ct. 949, 27 L. Ed. 800, in which the point decided was that one partner had an insurable interest in the life of his co-partner. We think, therefore, it may be safely said that the Virginia court was perhaps overconfident in declaring the proposition just quoted to be well settled. In the English courts it has been distinctly decided that a father has no pecuniary interest in the life even of his minor son (*Halford v. Kymer*, 10 Barn. & C. 725); and in *Worthington v. Curtis*, 1 Ch. Div. 419, the court assumed, as a proposition that did not need discussion, that a father has no insurable interest in the life of his adult son.

The cases thus cited and referred to are, with few exceptions, the only cases in which the question now before us has been passed upon, and they certainly justify the conclusion that there is a conflict of opinion, if not of decision, upon the question now before the court. But, while this is true, the weight of authority is, in our opinion, against the position that an adult son has an insurable interest in the life of his father merely by virtue of kinship. The current of the recent decisions shows a clear tendency to insist upon the existence of a pecuniary interest, actual or contingent, upon the part of the son before he can take out a valid policy upon his father's life. * * * Reversed.¹³

¹³ See, also, *New York Life Ins. Co. v. Greenlee*, 42 Ind. App. 82, 84 N. E. 1101 (1908).

CRONIN v. VERMONT LIFE INS. CO.

(Supreme Court of Rhode Island, 1898. 20 R. I. 570, 40 Atl. 497.)

Action by Catherine Cronin against the Vermont Life Insurance Company. On demurrer to the declaration.

STINESS, J. This action is brought to recover insurance on the life of the plaintiff's niece, and the main question raised by the demurrer to the declaration is whether the plaintiff had an insurable interest in the life of her niece. The English act of 1774 (14 Geo. III. c. 48, § 1) prohibited insurance on the life of a person in which the beneficiary shall have no interest, or by way of gaming or wagering. Although the statute has never been taken as a part of our law, its rule was generally followed in this country, as declaratory of the common law.

But, in defining the term "interest," the tendency of the decisions both in England and in this country has been inclusive, rather than exclusive. There has even been some question whether insurance without interest should be held to be void on the ground of public policy; but, in this state, we think it has been understood to be settled, since *Mowry v. Insurance Co.*, 9 R. I. 346, that some insurable interest must exist. This, too, is the generally accepted rule.

In *Clark v. Allen*, 11 R. I. 439, 23 Am. Rep. 496, it was held that a policy valid in its inception could be transferred to a bona fide purchaser, even though he had no interest in the life; and some of the objections to such insurance, on the ground of public policy, were considered, and shown to be fanciful, and not applied to other branches of law. For example, the element of chance enters into annuities; and the temptation to shorten life, in order to hasten the possession of a remainder-man after a life estate in real property, is as strong as in the case of a beneficiary under a life policy.

But these things have never been considered to be contrary to public policy. Still, upon principle, a purely speculative contract on the life of another is as objectionable on the grounds of public policy as a like contract in regard to grain or stocks. In fact, it is more so, and such a contract may properly be held to be void.

But the case is quite different when one, by his own contract, or even in the name of another, upon the ground of debt, affection, or mutual interest, procures insurance for the benefit of another, which is really to stand in the place of a testamentary gift. And so kinship and debt have come to be recognized as sufficient grounds of interest. *Bliss, Ins.* (2d Ed.) §§ 12, 13; *1 May, Ins.* (3d Ed.) § 102a.

Recent decisions have gone further, looking more to the situation of the parties than to these relations alone.

In *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924, Field, J., said: "It is not easy to define with precision what will constitute an insurable interest, so as to take the contract out of the class of wager

policies. It may be stated generally, however, to be such an interest, arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life." We think that this states a reasonable rule, and that it is now substantially the accepted rule. The demurrer in this case being to the whole declaration, we need not examine the counts in detail. The important facts are that the niece lived with the aunt from early childhood at different times, amounting to years; that their relations were as those of mother and daughter; that the plaintiff supported her niece, the insured; and that a debt, both of affection and of money, was due to the plaintiff, for which she expected, and had a right to expect, return from the insured. Does this set out an insurable interest? We do not understand the word "debt," as here used, to mean a debt recoverable at law, but a moral obligation, from which the plaintiff had the right to expect care and kindness from the niece in case of need. Taken in this view, we think it shows an insurable interest, under the principles above laid down.

In *Lord v. Dall*, 12 Mass. 115, 7 Am. Dec. 38, it was held that a sister had an insurable interest in the life of a brother, who stood to her in loco parentis. The court said, "In common understanding, no one would hesitate to say that in the life of such a brother the sister had an interest." The later case of *Loomis v. Insurance Co.*, 6 Gray (Mass.) 396, involved the question of the interest of a father in the life of a minor son; but Shaw, C. J., said that, upon broader and larger grounds, independently of the fact that the son was a minor, and that the assured had a pecuniary interest in his earnings, the court was of opinion that the father had an insurable interest. These broader grounds appeared further on to be "consideration of strong morals, and the force of natural affection between near kindred, operating often more efficaciously than those of positive law."

In *Insurance Co. v. France*, 94 U. S. 561, 24 L. Ed. 287, a case between brother and a married sister, not dependent, Bradley, J., goes so far as to say: "Any person has a right to procure insurance on his own life, and to assign it to another, provided it be not done by way of cover for a wager policy; and where the relationship between the parties, as in this case, is such as to constitute a good and valid consideration in law for any gift or grant, the transaction is entirely free from such imputation. The direction of payment in the policy itself is equivalent to such an assignment." In *Elkhart Mut. Aid B. & R. Ass'n v. Houghton*, 103 Ind. 286, 2 N. E. 763, 53 Am. Rep. 514, the insurable interest of a grandson in the life of a grandfather, with whom he lived, was upheld. It has also been sustained where there was no kinship, as in the case of a woman who was engaged to be married to a man (*Chisholm v. Insurance Co.*, 52 Mo. 213, 14 Am. Rep. 414), and in the case of a widow and her son-in-law, who lived together

(*Adams v. Reed*, 38 S. W. 420, 18 Ky. Law Rep. 858, 35 L. R. A. 692).

The principle of these and other like cases is that the interest does not depend upon any liability for support, nor upon any pecuniary consideration, nor even upon kinship. It may be for the benefit of the old or the young, where the relation between the parties is such as to show a mutual interest, and to rebut the presumption of a mere wager. The contract is complete and legal in itself, and, when considerations of public policy do not prohibit its enforcement, there is no reason why it should not be carried out.

The declaration in this case shows that the plaintiff's claim is not objectionable on the grounds of public policy. It shows that the relation of the plaintiff and her niece had been of such a character that each had reason to rely upon the other in case of need. Should the younger die first, the help and care which might have been expected from her in the declining years of the aunt could only be supplied by insurance on her life. This is no more speculation than a husband's provision for his wife in the same way. It is natural and reasonable, and in accordance with modern business methods. In short, it is security for an insurable interest.

We therefore think that the contract set out in the declaration is valid, since it falls within the proper line of distinction between valid contracts, where there is mutual interest, and invalid contracts, which are evidently mere speculation. The demurrer to the declaration is overruled.¹⁴

CONNECTICUT MUT. LIFE INS. CO. v. LUCHS.

(Supreme Court of United States, 1883. 108 U. S. 498, 2 Sup. Ct. 949, 27 L. Ed. 800.)

In Error to the Supreme Court of the District of Columbia.

FIELD, J.¹⁵ This was an action by Leopold Luchs on a policy of insurance upon the life of Levi Dillenberg, issued by the Connecticut Life Insurance Company in June, 1869. Luchs and Dillenberg were partners at the time in the business of buying and selling tobacco in the city of Washington. Their partnership was formed in October, 1866, each agreeing to contribute his services and one-half of the capital. It was understood that the money of Dillenberg was then invested in mining stocks, and could not at once be obtained. Luchs accordingly furnished the entire capital, which was over \$10,000. Dillenberg never contributed his portion, and, about two years after the partnership was formed, his failure in this respect caused dissatisfaction and complaint. It was thereupon suggested by one Myers, who

¹⁴ For a discussion of insurable interest based on relationship, see Cooley, *Briefs on the Law of Insurance*, vol. 1, p. 281.

¹⁵ Part of the opinion is omitted.

was employed by an agent of the insurance company, and who had been called in as an accountant to examine the books of the concern, that, as a means of "adjusting the dispute or misunderstanding between the partners," a policy of insurance should be obtained upon the life of Dillenberg for the benefit of Luchs, and that Dillenberg should retire from the firm within a year afterwards. Nothing, however, was then done upon this suggestion, but in the following year the policy in suit was procured. * * *

The second question presented for our determination is whether Luchs had an insurable interest in the life of Dillenberg. Upon this we have no doubt. Dillenberg was his partner and had not paid his promised proportion of the capital of the concern. At the time the policy was applied for he was still in default, and although it might have turned out that the actual amount due, upon a settlement of accounts, was less than the promised proportion, it was not a matter definitely ascertained at the time. Besides what was thus due to him, Luchs was interested in having Dillenberg continue in the partnership. He had such an interest, therefore, as took from the policy anything of a wagering character.

As this court said in *Warnock v. Davis*, recently decided: "It is not easy to define with precision what will, in all cases, constitute an insurable interest, so as to take the contract out of the class of wager policies. It may be stated generally, however, to be such an interest arising from the relations of the party obtaining the insurance, either as creditor of or surety for the assured, or from the ties of blood or marriage to him, as will justify a reasonable expectation of advantage or benefit from the continuance of his life. It is not necessary that the expectation of advantage or benefit should be always capable of pecuniary estimation. * * * But in all cases there must be a reasonable ground, founded upon the relations of the parties to each other, either pecuniary or of blood or affinity, to expect some benefit or advantage from the continuance of the life of the assured." 104 U. S. 779, 26 L. Ed. 924.

Certainly Luchs had a pecuniary interest in the life of Dillenberg on two grounds: because he was his creditor and because he was his partner. The continuance of the partnership, and, of course, a continuance of Dillenberg's life, furnished a reasonable expectation of advantage to himself. It was in the expectation of such advantage that the partnership was formed, and, of course, for the life expectation, was continued.

In *Morrell v. Trenton Mut. Life & Fire Ins. Co.*, 10 Cush. (Mass.) 282, 57 Am. Dec. 92, a policy was taken out by the plaintiff upon the life of his brother, who was about going to California, on an agreement that the latter should pay to him one-fourth of his earnings for the following year. In an action on the policy it was contended that the plaintiff had no insurable interest upon the life of the insured, but the court, after deciding that he had such an interest

from the fact that he held a promissory note signed by the firm of which the insured was a partner, also said that it was strongly inclined to the opinion that the plaintiff had another interest in the life of the person insured. "He had," said the court, "a subsisting contract with that person, made on a valuable consideration, by which he was to receive one-quarter part of his earnings in the mines of California for one year. Such an interest cannot, from its nature, be valued or apportioned. It was an interest upon which the policy attached. By the loss of his life within the year, the person whose life was insured lost the means of earning anything more, and the plaintiff was deprived of receiving his share of such earnings to an uncertain and indefinite amount."

In *Trenton Mutual Life & Fire Ins. Co. v. Johnson*, 24 N. J. Law, 576, a policy was taken out by the plaintiff on the life of one Van Middlesworth for \$1,000, one-half payable to the plaintiff and the other half to Van Middlesworth. They belonged to an association called the New Brunswick & California Mining & Trading Company, the capital stock of which consisted of 45 shares of \$600 each. The company consisted partly of shareholding members and partly of active members, the shareholders being each required to furnish a substitute to proceed to the mines of the company. The plaintiff owned one share, advanced \$600 of capital, and procured Van Middlesworth to go out as his substitute, which he did, and acted as his agent and substitute; and the assets of the company having been divided in California, he received the plaintiff's share, and afterwards died, not having paid it over. By one of the articles of the association all treasures and all the proceeds of the labor of each member, and all profits, were to go into a general fund for the benefit of the association. To the action brought on the policy it was objected that the plaintiff had no insurable interest in the life of the deceased. On this question the court said: "In the present case Johnson had a direct interest in the life of his substitute, whose earnings were to constitute a part of the joint funds, of which he was entitled to his share, an interest fully equivalent to the interests of a wife in the life of her husband, of a child in that of a parent, or a sister in that of a brother. And at Van Middlesworth's death, although prior to that time the company had been virtually dissolved, he had an interest in him as his creditor to the extent of his share of the assets in his hands."

In *Bevin v. Conn. Mut. Life Ins. Co.*, 23 Conn. 244, the plaintiff had obtained a policy of insurance for \$1,000 on the life of one Barstow, to whom he had advanced \$350, besides articles of personal property, to enable him to go to California and there labor for one year, on an agreement that he would account to the plaintiff for one-half of his gains. The court said that Barstow was the plaintiff's debtor and partner, giving to the plaintiff an interest in the continuance of his life, as by that means, through his skill and efforts, the plaintiff might expect, not only to get back what he had advanced, but

to acquire great gains and profits in the enterprise. "All the books," the court added, "hold this to be a sufficient interest to sustain a policy of insurance. As to the value of this interest, we think it must be held to be what the parties agreed to consider it in the policy. This was the sum asked for by the plaintiff, and which the defendants agreed to pay in case of death, and for which they were paid in the premiums given by the insured. The policy must, we think, be held to be a valued policy." And, after referring to a policy of insurance obtained by a sister on her brother's life, where no question seemed to have been made as to the amount, but only whether it was an interest which the law would recognize, the court said: "So, in every case, where a person on his own account insures the life of a relative, if the sum named in the policy is not to be the rule of damages, we inquire what is? The impossibility of satisfactorily going into the question in most cases, and especially where there is nothing to guide the inquiry, and everything is uncertain, would lead us to hold that a policy like this is a valued policy as most consistent with the understanding of the parties and the principles of law." * * *¹⁶

MUTUAL LIFE INS. CO. OF NEW YORK v. BLODGETT.

(Court of Civil Appeals of Texas, 1894. 8 Tex. Civ. App. 45, 27 S. W. 286.)

FINLEY, J.¹⁷ This is a suit upon a life insurance policy, showing upon its face to have been taken out by Mrs. Lucinda J. Downey, upon her life, in favor of her grandson, J. A. Blodgett, the plaintiff in the court below. The defendant answered * * * setting up a want of insurable interest in plaintiff. * * * The trial resulted in a verdict and judgment for plaintiff for amount of policy, attorney's fees, and 12 per cent. damages. From this judgment the insurance company appealed, and assigned errors. * * *

It is urged by appellant that the policy is void, for the reason that the beneficiary named in the policy had no insurable interest in the life of the insured, and the policy was speculative and wagering on the part of plaintiff. The policy recited that it was issued upon the application of Mrs. Lucinda J. Downey. J. A. Blodgett was named as the beneficiary, and his relation as grandson to the assured was therein disclosed. It is not shown that any fraud or deception was practiced upon the insurance company by which it was deceived as to the real party to the contract of insurance. It was proven that the beneficiary was to pay the premiums. This was known to the company. Indeed, his note was taken for the first premium, and the policy was issued by the company with full knowledge of the facts as to the relation of the parties, and of their respective interests and

¹⁶ For further discussion, reference may be made to Cooley, Briefs on the Law of Insurance, vol. 1, p. 296.

¹⁷ Part of the opinion is omitted.

undertakings under the contract. Under this state of fact, the company should not be permitted to deny that the policy speaks the truth as to the party who made the application and with whom the contract of insurance was made.

Mrs. Downey had an insurable interest in her own life, and had the right, as between herself and the company, when a policy was issued on her application, to name the person to whom the policy should be paid, regardless of insurable interest in her life being possessed by such person. The fact that the premium was paid by the beneficiary does not give to the contract the character of a wagering contract; nor does the fact that the beneficiary has no insurable interest in the life of the assured render the policy void as against public policy. The courts will treat the person named as beneficiary, having no insurable interest, as a trustee appointed to collect the policy for the benefit of those legally entitled, thereby enforcing the contract by which the company has solemnly bound itself, and at the same time conserving public policy, by preventing the stranger from gambling in the life of his fellow or profiting by his death. *Insurance Co. v. Williams*, 79 Tex. 633, 15 S. W. 478; *Insurance Co. v. Hazlewood*, 75 Tex. 351, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893; *Investment Co. v. Baum*, 29 Ind. 236; *Langdon v. Insurance Co. (C. C.)* 14 Fed. 272; *Curtiss v. Insurance Co.*, 90 Cal. 245, 27 Pac. 211, 25 Am. St. Rep. 114; *Mayher v. Insurance Co.* (decided by this court at present term) 87 Tex. 169, 27 S. W. 124.

Under this view, the question whether the beneficiary had an insurable interest in the life of his grandmother becomes abstract and its consideration unnecessary. So far as the insurance company's liability is concerned, it cannot avoid the payment of the policy upon this ground. * * * 18

V. Interest of Creditor in Life of Debtor¹⁹

RITTLER v. SMITH.

(Court of Appeals of Maryland, 1889. 70 Md. 261, 16 Atl. 890, 2 L. R. A. 844.)

Bill by Emeline Smith, administratrix of Victor Smith, against William H. Rittler. Decree for complainant, and defendant appeals.

¹⁸ The judgment of the trial court was reversed for error in refusing to admit certain evidence on other issues.

For a discussion of question based on the extent of interest, see Cooley, *Briefs on the Law of Insurance*, vol. 1, p. 298 et seq. See *Equitable Life Ins. Co. v. Hazlewood*, 75 Tex. 338, 12 S. W. 621, 7 L. R. A. 217, 16 Am. St. Rep. 893 (1889), for a discussion of the Texas rule.

¹⁹ For discussion of principles, see Vance on Insurance, § 53. See, also, Cooley, *Briefs on the Law of Insurance*, vol. 1, pp. 294-301.

MILLER, J.²⁰ In June, 1886, Victor Smith was indebted to William H. Rittler in the sum of about \$1,000, and, Smith being insolvent, Rittler took out certificates of insurance on Smith's life in four several mutual aid associations, aggregating on their face the sum of \$6,500. These certificates were all in favor of Rittler, and he paid all the premiums or assessments thereunder. Smith died in March, 1887, and Rittler collected from these insurances the sum of \$2,124.82, which appears to have been all that could have been collected according to the terms of the certificates and the financial condition of the associations. Deducting from this sum the debt and interest due Rittler, the premiums he had paid, and the costs and expenses of effecting the insurances, there remained a balance of \$474.53 as of the 1st of June, 1887. On the 3d of October following, letters of administration on Smith's estate were granted to an administratrix, who thereupon filed her bill, claiming this balance as belonging to the estate of the decedent. In his answer Rittler denied this claim, and insisted that the money belonged to him. The case was heard on bill and answer, and the court below decreed in favor of the complainant. From this decree Rittler has appealed.

The question as thus presented is an interesting one, is of first impression in this state, and has been very ably argued. On the part of the appellant it is contended that where a creditor, with his own money, and for his own account, effects and keeps up an insurance on the life of his debtor, the whole of the proceeds belong to him unless it appears that he has gone into it for the mere purpose of speculation, which, in this case, is expressly negatived by the answer, the averments of which must be taken as true, the case having been heard on bill and answer. On the other hand, counsel for the appellee contend that where the creditor receives more than enough to reimburse him for his debt and outlay, with interest, he will, as to the balance, be regarded as a trustee for the personal representative of the debtor.

* * *

There have been numerous decisions upon this subject, some of which are conflicting. On many points, however, bearing upon the question, there is a general concurrence of judicial opinion and authority. For instance, it is generally held by the courts in this country that one who has no insurable interest in the life of another cannot insure that life. Such insurances are considered gambling contracts, and for that reason void at common law, apart from any statute forbidding them. In England they were held valid at common law, but were prohibited as introducing a "mischievous kind of gaming" by the first section of the statute (14 Geo. III, c. 48). The effect of this section, as construed by the English courts, is to make the law of England, by act of parliament, the same as it has been held to be by the courts in this country without such an act. In some cases they

²⁰ Part of the opinion is omitted.

have been denounced as void, not simply because they tend to promote gambling, but because they are incentives to crime. The force of this latter suggestion has been, and may well be doubted. It means that one not related or connected by consanguinity or marriage, who may have a direct pecuniary interest in the speedy death of another, will thereby be tempted to murder him, though he knows that hanging is the penalty for such a crime. This doctrine, carried to its logical result, has a far reaching effect. It strikes down every legacy to a stranger which may become known to the legatee, as is frequently the case, before the death of the testator. It makes void every similar limitation in remainder after the death of a life-tenant. Every like conveyance of property, in consideration that the grantee shall support the grantor during his life, falls under the same condemnation. Yet we know of no case in which a court has declared such testamentary dispositions or conveyances to be void on this ground. Other instances, in which the same result would follow from the application of this doctrine, could be readily suggested, but we need not pursue the subject further. All the authorities also concur in holding that a creditor has an insurable interest in the life of his debtor.

* * *

In support of the view taken by the appellee's counsel, cases have been cited in which it has been held that the assignee of a life policy, who has no insurable interest in the life, stands in the same position as if he had originally taken out the policy for his own benefit. In other words, the contention is that the assured himself can make no valid, absolute assignment of his policy to one who has no insurable interest in his life. But our own decisions are opposed to this. It is settled law in this state that a life insurance policy is but a chose in action for the payment of money, and may be assigned as such under our act of 1829, c. 51. *Insurance Co. v. Flack*, 3 Md. 341, 56 Am. Dec. 742; *Whitridge v. Barry*, 42 Md. 150. It is quite a common thing for the bond or promissory note of a private individual to be sold through a broker to a bona fide purchaser for less than its face value, and when the latter takes an assignment of it without recourse, he becomes its absolute owner, and is not bound to refund to the vendor anything he may recover upon it over and above what he paid for it. So a life policy, being a similar chose in action, may be disposed of and assigned in the same way, provided the assent of the insurer is obtained where it is so stipulated in the instrument. In such case, the assignee must, of course, keep the policy alive by the due payment of premiums if he wishes to realize anything from it. Such an assignment is valid in this state if it be a bona fide business transaction, and not a mere device to cover a gaming contract. Such is also the English rule. *Ashley v. Ashley*, 3 Sim. 149.

These considerations prevent us from adopting some of the reasoning of the supreme court in *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924. It seems to us, with great deference, that from the facts in

that case the association, which was the assignee, could well be regarded as standing in the same position as if it had taken out the policy in its own name, and, having no insurable interest in the life, it clearly became a wager policy. The assignment was made the day after the policy was issued, in pursuance of an agreement to that effect made the day of its issuance. The assignment was evidently a mere device to cover up a gaming transaction. In the preceding case of *Cammack v. Lewis*, 15 Wall. 643, 21 L. Ed. 244, the debt due the creditor was only \$70, and the policy was for \$3,000. It was taken out by the debtor, who was in bad health, at the suggestion of the creditor, and was assigned to him immediately after it was made out, he, at the same time, taking a note from his debtor for \$3,000, confessedly without consideration. In view of these facts, the court well said: "It was a sheer wagering policy, and probably a fraud on the insurance company. To procure a policy for \$3,000 to cover a debt of \$70 is of itself a mere wager. The disproportion between the real interest of the creditor and the amount to be received by him deprives it of all pretense to be a bona fide effort to secure the debt, and the strength of this proposition is not diminished by the fact that Cammack was only to get \$2,000 out of the \$3,000, nor is it weakened by the fact that the policy was taken out in the name of Lewis, and assigned by him to Cammack." It was "under these circumstances" that the court held that Cammack could hold the policy only as security for the debt due him when it was assigned, and such advances as he might afterwards make on account of it. If such, then, be the nature of a life insurance contract, and if a bona fide assignee for value, though a stranger, may recover and hold the whole amount for his own use, why may not a creditor, who, in pursuance of a bona fide effort to secure payment of his debt, insures the life of his debtor, and takes the policy in his own name, or for his own benefit, be entitled to hold all he can recover? He is in fact the owner of the policy, takes the risk of the continued solvency of the insurance company, and is obliged to keep the policy alive by paying the annual premiums during the life of the debtor, and the latter is under no obligation to do anything, and in fact does nothing in this respect. If he pays the debt to his creditor, he has only discharged his duty, and what interest has he in the policy, or in what his creditor may recover upon it? * * *

We agree that there may be such a gross disproportion between the debt and the amount of the policy as to stamp the transaction as indicating upon its face want of good faith, and as a mere speculation or wager. The case of *Cammack v. Lewis* affords an instance of such gross disparity, but no general rule on this subject has as yet been laid down by the courts, and it is probably better to leave each case to depend on its own circumstances. The disparity between the debt of \$1,000 and \$6,500, the aggregate of the sums named in the certificates, is certainly great, but upon examination it is more apparent than real

The answer, which we must take as true, shows bona fides on the part of the creditor. The policies were all in mutual aid associations, where mortuary dues are paid by assessments and where, of course, the sum to be realized depends upon the number and solvency of the members. One of the certificates for \$2,000 contained a condition that only one-half should be paid if the assured should die within one year from its date, an event which actually occurred. Another expressly provided that he should receive an amount not exceeding \$2,000, but according to the numbers liable to assessment on this certificate, and from that he received, according to its terms, only \$250. Another of the associations was in financial difficulties, and he compromised his claim on a certificate for \$1,000 and received only \$132.82. By taking out these certificates he became liable to be assessed as a member, and during the short time they were running (from June to the following March) he paid, in this shape and in premiums, the sum of \$351.75. In view of the character of these certificates, and of the associations by which they were issued, we cannot say the disproportion between the debt and the real amount and value of the insurances is so great in this case as to warrant a sentence of condemnation against the transaction as being a mere speculation or wager on the life of the debtor. * * *

On the whole, we are of opinion the weight of reason as well as of authority sustains the appellant's claim. We shall therefore reverse the decree appealed from, and dismiss the appellee's bill.

VI. Interest of Assignee of a Life Policy ²¹

CHAMBERLAIN v. BUTLER.

(Supreme Court of Nebraska, 1901. 61 Neb. 730, 86 N. W. 481, 54 L. R. A. 338, 87 Am. St. Rep. 478.)

Action by Florence M. Butler, administratrix of the estate of Robert L. Butler, deceased, against Charles M. Chamberlain and others, to recover the proceeds of a policy of life insurance issued by the Home Life Insurance Company on the life of the said Robert L. Butler. This policy Butler assigned to Chamberlain, and by Chamberlain it was subsequently assigned to one Crandall. It appeared that after the assignment to Chamberlain he paid several of the annual premiums due on the policy. From a judgment for plaintiff, the defendant Chamberlain brings error.

²¹ For discussion of principles, see Vance on Insurance, § 54. See, also, Cooley, Briefs on the Law of Insurance, vol. 1, pp. 262-278.

NORVAL, C. J.²² * * * Several interesting questions are presented in the briefs of counsel, but we think it unnecessary to decide more than one, owing to the position we shall take on it. While the petition alleges that the policy was merely pledged, it is agreed by the stipulation quoted that it was in fact sold and assigned absolutely by Butler to Chamberlain. If such assignment was valid, then the latter was the owner of it, and had the right to dispose of it as he saw fit. We think the law is that under the facts it was lawful for Butler to dispose of the policy. We are aware that there is a sharp conflict of authorities in the several American courts relative to the validity of a sale of life insurance policy by one having an insurable interest to one not having such interest. In all the states, perhaps, it is held against public policy for one not having an insurable interest to procure insurance upon the life of another, even though it be with the consent of such person. In some of the states it is held against public policy for one who has taken out insurance upon his own life to transfer it to one having no insurable interest. In some of the states such a transaction is prohibited by express legislative enactment.

But the question to be decided here is, assuming that Chamberlain had no such interest in the life of Butler, could he legally buy the policy in question, such policy in its inception having been valid, and taken out in good faith by Butler, with no intention or design on his part of assigning it subsequently to Chamberlain. Those courts which hold such a transaction void proceed on the ground of public policy. Originally, at common law, choses in action that were assignable were exceedingly few, but the tendency is now reversed, and those not assignable are the exception, rather than the rule. The modern policy being, then, as above stated, the reason for a rule contrary to such tendency should be exceedingly strong before a court, where the question is yet unsettled, should adopt a contrary rule in any given case. While public policy is a salutary thing, it has its limitations and dangers. Among them is the fact that it is an exceedingly indefinite term, has no lines of distinct demarkation, and may readily lend its aid to a court anxious to make a good case, rather than a safe precedent. For that reason, before a case is decided upon that ground solely, courts should be very sure that the reasons for so doing are clear, strong, and admit of no doubt concerning their reasonableness or applicability.

Now, the principal reason for branding assignments of this nature as inimical to sound public policy is that the interest of a stranger in the death of the insured is so strong as to tempt to murder of the latter, the earlier to participate in the avails of the policy. Such interest doubtless tends to such a desire. But the same desire would exist on the part of a creditor, who has an insurable interest, or of one

²² Part of the opinion is omitted and the statement of facts is rewritten.

who advanced money on the policy, where his only hope of reimbursing himself for the loan might be the policy. It is exceedingly doubtful if strangers are any more apt to either desire or seek to accomplish the death of others than are those nearly related to them. The strength of this desire, where it exists, depends not so much upon the consanguinity of the parties as upon the moral stamina of him who holds the expectancy, be that expectancy an insurance policy, a devise, a remainder, or other acquisition which may not be had until the death of another.

Another reason sometimes assigned for holding such assignments illegal is that an assignee having no insurable interest is in the position of one who, in the first instance, takes out a wager policy. But we think not. If an insurable interest exists in the beneficiary at the time the policy is issued, and it is taken out in good faith, the object and purpose of the rule against wager policies would seem to have been sufficiently attained (16 Am. & Eng. Enc. Law [2d Ed.] 846), and there is no more reason to apply the rule to policies taken out in good faith, and afterwards assigned in good faith, than there would be were the assured to retain it in his own hands.

Counsel rely upon *Warnock v. Davis*, 104 U. S. 775, 26 L. Ed. 924, as an authority to uphold the judgment of the lower court. That case and this present two very different questions. In that case the insured took out the policy in pursuance of an agreement that a third party, having no insurable interest in his life, should, in consideration of certain payments to be made by it, receive at his death nine-tenths of the insurance money. In the opinion Justice Field says: "The assignment of a policy to a party not having an insurable interest is as objectionable as the taking out of a policy in his name." Under the facts involved in that case the language was appropriate, for there was collusion between the insured and the party to be benefited by his death by a receipt of the amount above mentioned. But the language is not applicable to this case, for there was no agreement between Butler and Chamberlain, at the time the policy was procured, that the latter should participate in its avails. The transaction with him was wholly independent of and subsequent to the original one between Butler and the insurance company. If their agreement had existed prior to the issuance of the policy, or contemporaneous therewith, then the words quoted would be applicable; otherwise not.

That this is the meaning of the words is clear when we read *Insurance Co. v. France*, 94 U. S. 567, 24 L. Ed. 287, and *Insurance Co. v. Schaefer*, 94 U. S. 457, 24 L. Ed. 251. In the *France Case* that court lays down the rule applicable to the facts in this case, viz. that any person has a right to procure insurance on his own life, and to assign it to another, provided it be not done by way of cover for a wager policy. The intention and good faith of the parties are the governing principles. In the *Schaefer Case* the court held that a life

insurance policy originally valid does not cease to be so upon the intermission of the assured party's interest in the life insured. It was certainly not intended in the Warnock Case to overrule or modify either of them. They are not in conflict with that case when the facts are remembered. The language of the court in the Warnock Case is unfortunately somewhat misleading in several instances, although the ultimate conclusion reached is right. The comments therein on the New York cases (*Valton v. Assurance Co.*, 20 N. Y. 32, and *St. John v. Insurance Co.*, 13 N. Y. 31, 64 Am. Dec. 529) are uncalled for, and not involved in the issues, for the questions of law decided in those cases are very different from, and not necessarily conflicting with, the law involved in the Warnock Case.

We are aware that several eminent American courts disagree with the New York cases cited, and with other courts of this country which agree with the latter. It seems that to hold contrary to that rule would have the effect mentioned in *St. John v. Insurance Co.*—"without the right to assign, insurances on lives lose half their usefulness"; a fact that should not be lost sight of in this day, when almost every person carries life insurance of some character, the commercial value and usefulness of which should be fostered, rather than crippled or minified. If such choses in action may be legally sold absolutely, it is plain that more can be realized from them in the day of need than if valuable only as security for loans. And until it shall be made to appear that in those jurisdictions where such policies are assignable absolutely crimes committed by such assignees are more frequent than in those where assignments of the nature of the one here involved are illegal, we are of opinion that the reasons for holding such transactions void are insufficient.

Chamberlain, then, being, under the facts agreed on, the absolute owner of the policy, had the right to transfer it to Crandall, and such act was not a conversion of the policy or insurance, for he was entitled to the whole of the proceeds thereof, free from all claims of the plaintiff or the estate of the deceased. The judgment is therefore reversed.²³

²³ See, also, *Hardy v. Aetna Life Ins. Co.*, 152 N. C. 286, 67 S. E. 767 (1910). For a collection of authorities, see *Gordon v. Ware Nat. Bank*, 132 Fed. 444, 65 C. C. A. 580, 67 L. R. A. 550 (1904). The decisions of Connecticut, Georgia, Illinois, Indiana, Maryland (see *Rittler v. Smith*, ante, p. 91), Massachusetts, New Hampshire, New York, Rhode Island, and Wisconsin are in accord with the principal case. Alabama, Michigan, Virginia, Kansas, Texas, and Pennsylvania hold that an insurable interest is necessary. The question is unsettled in Missouri and Louisiana.

THE MAKING OF THE CONTRACT

I. In General—Offer and Acceptance ¹

ZIMMERMANN v. DWELLING HOUSE INS. CO. OF BOSTON.

(Supreme Court of Michigan, 1896. 110 Mich. 399, 68 N. W. 215, 33 L. R. A. 698.)

Action by Frederick C. Zimmermann against the Dwelling House Insurance Company of Boston. Judgment for defendant, and plaintiff appeals.

MOORE, J.² The plaintiff was a local agent of the defendant at Saginaw, and had been for several years prior to the date of the policy sued upon in this case; and, at the time the policy was issued, there was another local agent representing the defendant in the city. On May 15, 1893, plaintiff wrote a policy in the defendant company, insuring himself in the sum of \$1,500 on his household goods, \$250 on his barn, \$100 on his horse, and \$150 on his vehicles, robes, feed, etc. Without notifying the company of this risk, he retained the policy and the daily report which is usually sent to the company until May 20, 1893, claiming that his barn was not completed and ready for occupancy before that date. On that date he sent the policy and daily report, by mail, to the home office of the defendant, at Boston, Mass. These papers were received by the company on May 23, 1893. Before sending the policy, the plaintiff had indorsed upon it the words, "Kindly approve and return." The property covered by this policy was totally destroyed by a large fire on May 20, 1893, about 6:30 o'clock in the evening. The fire started at about 4:30 p. m. The plaintiff notified the company of the loss May 24th, when the general agent, W. J. Nichols, arrived in the city to look after the losses sustained by the company in this large fire. No premium was ever paid or tendered by the plaintiff. The policy was never accepted by the company, and was never delivered or returned to the plaintiff. The company declined to pay the loss. The plaintiff sued the defendant, and the judge directed a verdict in favor of defendant.

It is claimed by the appellant that he was authorized to write this policy by W. J. Nichols, the general agent of the defendant, during

¹ For discussion of principles, see Vance on Insurance, § 56. See, also, Cooley, Briefs on the Law of Insurance, vol. 1, pp. 407-435.

² Part of the opinion is omitted.

a conversation between them in the city of Saginaw, in February, 1893. The conversation is described by the plaintiff as follows: "I told him that I wanted to write a policy upon my own goods, and he said: 'Write it in the usual way.' That is the answer he gave me.
* * *

The property which plaintiff proposed to write was not pointed out to Nichols, but the plaintiff told Nichols it would be his household goods and barn then building. * * *

It is claimed that this conversation between the general agent of the company, in which the general agent of the company used the expression, "Write it in the usual way," supplemented by the writing of the policy and evidence "that it is the custom of insurance agents in Saginaw valley to insure their own property in the companies for which they are agents, in the same manner that they insure property of other persons—i. e. "that the custom and usual way in the city of Saginaw and valley of writing policies upon an agent's own property at that time was to make a memorandum of the risk; then he would make a daily report of the risk, and then a policy conforming to that, and spread it upon his insurance register"—made a contract upon which the company would be liable, whether the policy was accepted at the home office or not. We cannot sustain that contention. When this conversation was held, the barn was not built. It was not finished until about the 15th of May. No statement was made as to the value of the property to be insured, or for how much it was to be insured, or what rate of premium was to be paid. No date had been fixed for the commencement or termination of the risk. Giving the most liberal construction possible to the language used, and what was done, it did not constitute a mutual and valid contract, binding upon both parties. *Michigan Pipe Co. v. Michigan Fire & Marine Ins. Co.*, 92 Mich. 482, 52 N. W. 1070, 20 L. R. A. 277.

In its logical order, the next question for consideration is: Did the writing out of the daily report and the policy, and its entry on the policy register, constitute a contract before the policy was approved by the company? It is elementary law that an agent must not be personally interested adversely to his principal. *Green v. Knoch*, 92 Mich. 26, 52 N. W. 80; *Iron Co. v. Kirkpatrick*, 92 Mich. 252, 52 N. W. 628. An agent for receiving applications ceases to be an agent so long as he acts in a matter in which his personal interest is concerned. If he applies for insurance on his own property, as to that property he is no agent of the company. He cannot, by the familiar rule of law, as agent, represent antagonistic interests. *May, Ins.* § 125, and cases cited. It follows reasonably, I think, that, if the agent cannot act for the company so as to bind it where he himself is an applicant for insurance, the company would not be bound until his act in writing the policy was approved by it. The record shows that, while the policy was written May 15th, for some reason it was not posted for mailing until May 20th, and was not received until May 23d,

three days after the loss occurred. The policy never was approved by the company, and no contract creating liability was made.

The judgment is affirmed. The other justices concurred.

II. The Form Required—Oral Contracts³

HICKS v. BRITISH AMERICAN ASSUR. CO.

(Court of Appeals of New York, 1900. 162 N. Y. 284, 56 N. E. 743, 48 L R. A. 424.)

Action by Georgiana Hicks against the British America Assurance Company on a contract. From a judgment in plaintiff's favor (13 App. Div. 444, 43 N. Y. Supp. 623), defendant appeals.

PARKER, C. J.⁴ We are agreed that the verdict of the jury establishes that on the 30th day of December, 1893, defendant's agent Hobart had a conversation with Col. Hicks, plaintiff's assignor, the legal effect of which was to create a contract of present insurance in the sum of \$2,500 upon property of Col. Hicks, which was consumed by fire two days later. The agreement that the contract was one of present insurance accords with the allegations of the complaint, the theory of the counsel as shown by their method of trial, and the charge of the court. That position cannot be attacked from any source, for either that which was said operated to create a contract of present insurance, or else no contract was ever made binding upon the defendant. The evidence tended to show a contract to insure, and nothing else. It is not pretended that a contract of any kind between these parties was made after the conversation of December 30th. The jury have found that the defendant's agent said to Hicks, after a general discussion on the subject of insuring the property, "You are insured from noon on the 30th day of December, 1893, to noon of December 30, 1894." The legal effect of this answer to the application for insurance made by Col. Hicks was to create a complete, binding agreement for insurance for the period named, upon which he was entitled to recover for the damages sustained by the fire, had he made performance on his part. *Ruggles v. Insurance Co.*, 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674.

This contract of insurance, although verbal, embraced within it the provisions of the standard policy of fire insurance, which the

³ For discussion of principles, see Vance on Insurance, §§ 57-59. See, also, Cooley, Briefs on the Law of Insurance, vol. 1, pp. 391-406.

⁴ Part of the opinion is omitted.

legislature in its wisdom formulated for the protection of both insured and insurer. It is usual for the company to issue a policy of insurance evidencing the contract between the parties; but the policy accomplishes nothing more than that, for, when the contract is entered into between the agent and the owner, whether the binder be verbal or in writing, it includes within it the standard form of policy, and the contract is a completed one. *Ruggles' Case*, supra; *Lipman v. Insurance Co.*, 121 N. Y. 454, 24 N. E. 699, 8 L. R. A. 719; *Karelsen v. Sun Fire Office*, 122 N. Y. 545, 25 N. E. 921; *Underwood v. Insurance Co.*, 161 N. Y. 413, 55 N. E. 936. In the three cases last cited the binder had been reduced to writing, but there is no distinction whatever in principle between those cases and the one at bar, for in each there is a binding contract to insure, and necessarily according to the only form of insurance contract authorized by the laws of this state.

The law reads into the contract the standard policy, whether it be referred to in terms or not. In *Lipman's Case*, supra, Judge Andrews, in speaking of the construction to be put upon the binding slip, issued in that case, said: "The construction is, we think, the same as though it had expressed that the present insurance was under the terms of the usual policy of the company to be thereafter delivered." And in *Karelsen's Case* the court said: "While the binding slip contained none of the conditions usually found in insurance policies, the contract evidenced by it was the ordinary policy of insurance issued by the company. So that, in any construction of the contract, it must be regarded as though it had expressed that the present insurance was under the terms of the usual policy of the company to be thereafter delivered."

So that all this plaintiff had to do, in order to recover in this action, aside from showing a loss by fire, and compliance on her part with the conditions of the contract, was to prove the making of the contract. This was accomplished by proving the conversation between her assignor and the agent, for the conversation disclosed the sum for which the property was to be insured, the amount of premiums, and the period of insurance, and the statute provided for all of the other conditions of the contract of insurance. Neither party to it had the right to add to or take from the requirements of the legislature in that regard. The making of the contract the plaintiff proved to the satisfaction of the jury, and she did not attempt to prove anything more. This the trial court, as well as the counsel, understood, and the case was tried upon that theory. It has been discovered in this court, however, that the judgment against the defendant cannot be sustained if this action be now treated in accordance with the theory that induced its commencement, and upon which it was tried, namely, that the plaintiff's assignor made a valid contract of insurance with the defendant, by virtue of which this plaintiff, as assignee, is entitled to recover to the extent provided

for by the policy for the damages sustained by her through the destruction by fire of the building insured.

The error which calls for a reversal of the judgment, if this be treated as an action on the contract, lies in the trial court's charge to the jury, in effect, that, as matter of law, it was not necessary for the insured to present to the defendant proofs of loss in accordance with the requirements of the standard policy. To avoid this result, it is proposed in the dissenting opinion not only to set at naught the many decisions of this court holding that on an appeal a case must be disposed of upon the theory upon which it was tried (*Snider v. Snider*, 160 N. Y. 151, 54 N. E. 676; *Stephens v. Meriden Britannia Co.*, 160 N. Y. 178, 54 N. E. 781, 73 Am. St. Rep. 678; *People v. Dalton*, 159 N. Y. 235, 53 N. E. 1113; *Drucker v. Railway Co.*, 106 N. Y. 157, 12 N. E. 568, 60 Am. Rep. 437; *Baird v. Mayor, etc.*, 96 N. Y. 567), but also to decide that, growing out of this contract, the plaintiff had another cause of action, the maintenance of which did not require the service of proofs of loss. Hence it is claimed that, by treating the case as having been tried upon that theory, the court may avoid reversing the judgment, for in such a case it would have been unnecessary to charge that the service of proofs of loss was essential to recovery. This newly-discovered cause of action is said to spring out of the promise, made at the time the contract was entered into, that the defendant would deliver to the insured evidence of the contract in the shape of a policy of insurance. The contract was completed at the moment the agent said, "You are insured from noon on the 30th day of December, 1893, to noon on the 30th day of December, 1894" (*Ruggles v. Insurance Co.*, *supra*); and it is agreed by every member of this court that the defendant is liable to the plaintiff on the contract thus made in the full amount of the policy, if the damage was sustained in the manner referred to in the policy, and plaintiff performed the conditions imposed upon him by it.

But it is said that he may recover either on the contract, or instead, if he elects, on the ground that the defendant failed to deliver to him written evidence of the contract; i. e. a policy of insurance. If the case were one where the written evidence of the contract had to come into the possession of the plaintiff before recovery could be had thereon, then it is true that an action in equity might be brought, praying for a delivery of the policy that the defendant withheld, and further demanding that, upon the policy delivered in pursuance of the decree, the plaintiff should have judgment in the amount specified in the policy for her damages by fire; and even then the plaintiff would have to abide by the terms of the policy, delivery of which the judgment should decree. But that is not this case at all. To enable her to recover, it was not necessary for this plaintiff to have physical possession of the policy which the agent promised to give her assignor. *Ruggles Case*, *supra*. Her

action was not founded upon a policy, but upon the contract of insurance made upon the 30th day of December, which, as both parties agreed, was to begin at noon on that day, no matter when the policy, which the parties intended should furnish evidence of the contract, should be delivered. The action was brought, tried, and decided upon that theory; and no one disputes that the judgment could in this court stand upon that theory, had the trial court charged the jury correctly in relation to the necessity of serving proofs of loss. It is apparent, therefore, that the plaintiff sustained no damage by reason of the defendant's failure to furnish her assignor with written evidence of the contract. Had the promise been kept, the plaintiff might not have been obliged to call her assignor to prove the contract, thus subjecting him, as it turned out, to be confronted with impeaching testimony; but neither the plaintiff nor her assignor was otherwise damaged, for he found no difficulty in proving a contract to the satisfaction of the jury. The possession of the promised policy, therefore, would have been a convenience possibly, but nothing more.

Plainly, therefore, it is not true that the plaintiff suffered damage in the amount of the contract of insurance by reason of the failure of the defendant to deliver a policy reciting the terms of the contract entered into, and hence the judgment cannot be affirmed on the ground that the plaintiff sustained damages in the sum of \$2,500, because the defendant omitted to deliver a policy. Nor do I think that a sound public policy would sanction the creation of such a precedent even if a legal principle could be found upon which to rest it.

The legislature of the state of New York has prescribed a standard form of policy for the protection of both insurer and insured. It contains provisions specially protecting the insured from harsh methods by insurance companies. On the other hand, it provides that which experience has shown to be necessary in order to protect insurance companies from being victimized through fraud; and among the conditions which the legislature, in its wisdom, has caused to be incorporated into the standard policy is one making it necessary that the insurer shall have immediate notice of the facts and circumstances of the fire; another, that within 60 days the owner shall present proofs of loss, duly verified, in which shall be stated the circumstances of the fire, and the value of the property destroyed, and various other things which it is deemed important that insurance companies should know before being called upon to adjust a loss; still another provides that no local agent shall have the power to waive any of these written conditions, except by a writing.

It is unnecessary to present the reasons which induced the legislature to require these conditions precedent to a recovery upon a policy of insurance. It is sufficient for our purpose that the legislature declared that it should be so, and we should see to it that

the general trend of our decisions is towards the enforcement of the legislative command, instead of its nullification. This plaintiff had the right, as it is conceded on all hands, to recover on the contract of insurance which her assignor made with the defendant's agent, whether a policy was subsequently delivered to him or not; but, as the standard policy was necessarily a part of the contract, he should be required to comply with the conditions of that policy, and give notice of the facts and circumstances of the fire, and present proofs of loss duly verified.

The view taken by some of my Brethren, however, is that it was unnecessary to give notice of the fire and present proofs of loss within 60 days, or at any other time, because, it is said, such an action need not be treated as on a contract of insurance, but on a contract to give a policy, which has not been carried out, and, therefore, prior to beginning suit, which may be done at any time within six years instead of one year, as provided in the standard policy, the insured has nothing whatever to do when he sustains a loss by fire but lie by until, as in this case, several months have passed, or, in some other case, until years have gone by, without giving the company notice of the fire or any proofs of loss whatever. He may then bring a suit, claiming that two days, or less, or more, before the fire, the defendant's local agent, without receiving any premium, agreed to, but did not, issue a policy, for which defendant is liable to plaintiff in the amount of the sum for which it was agreed that the policy should issue. If such a procedure should be sanctioned by this court, then might an insurance company be mulcted in damages without having had an opportunity to investigate promptly the origin of the fire and the value of the thing destroyed, and thus would the door be opened wide for the perpetration of fraud.

It is said that, if the foregoing argument seems not to be defective upon its mere reading, it is, nevertheless, so, because it leaves out of consideration the decisions of this court in *Ellis v. Insurance Co.*, 50 N. Y. 402, 10 Am. Rep. 495; *Angell v. Insurance Co.*, 59 N. Y. 171, 17 Am. Rep. 322; *Van Loan v. Insurance Co.*, 90 N. Y. 280. But the situation which those cases were designed to meet no longer exists. During the period of time in which they and others were decided, and down to the year 1886, each insurance company was at liberty to insert such provisions in the policy of insurance issued by it as it deemed best. The result was that there was no uniformity in policies of insurance, and, when loss by fire occurred prior to a delivery of the policy, it became necessary for the assured to secure possession of the policy, either by its voluntary delivery to him by the officers of the company, or in pursuance of a decree in a suit in equity for specific performance. Thereon he could found a judgment for the damages sustained by the fire, or he was allowed to recover the damages sustained for a breach of the contract, which was treated as a contract for the delivery of a policy. The

last one of the cases cited was decided in 1882. Four years later the legislature, by chapter 488 of the Laws of 1886, enacted and provided for a uniform policy of fire insurance, to be made and issued in this state by all insurance companies taking fire risks on property within this state, to be known and designated as the "standard fire insurance policy of the state of New York."

Upon the passage of this important legislation the policy of insurance was no longer of special moment, except as evidence that a contract to insure had been made; for it was no longer competent for the parties to incorporate into the policy any provisions whatever outside of those embraced within the terms of the standard policy, and thereafter the contract to insure was, by common consent of the profession and the courts, scientifically treated as a contract of insurance, and not, as formerly, a contract to issue a policy, as an examination of the authorities in this court from the Ruggles Case down will show. * * * Reversed.⁵

PHŒNIX INS. CO. OF HARTFORD, CONN., v. IRELAND.

(Court of Appeals of Kansas, 1899. 9 Kan. App. 644, 58 Pac. 1024.)

SCHOONOVER, J.⁶ This is an action by C. F. Ireland & Co. against the Phoenix Insurance Company, of Hartford, to recover damages for a breach of an oral contract to insure the defendants in error's stock of goods, alleged to have been made by defendants in error with plaintiff in error through its agent, I. E. Perley. The case was tried to a jury. Verdict and judgment for C. F. Ireland & Co., plaintiffs below. The insurance company brings the case here for review.

The admissions of the parties eliminated from this case all minor matters. The main question submitted to the jury was whether or not the oral contract, as claimed by plaintiffs below, was entered into. Upon this question the jury found for the plaintiffs. The facts, briefly stated, are: The defendants in error took out an insurance policy, which was renewed from year to year; the local agent some times issuing new policies, and sometimes issuing renewal receipts. After the insurance had been in force for several years, the rate was increased from \$9 to \$11. A new policy was issued in defendant company, and the insured told the local agent to take care of the insurance,—keep it up,—the same as he had hitherto done. At the expiration of the year the agent forgot to issue a renewal

⁵ Conditions in parol contracts of insurance, see, also, Salisbury v. Hekla Fire Ins. Co., post, p. 111.

⁶ Part of the opinion is omitted.

receipt, and a short time thereafter the property was totally destroyed by fire. The contract was terminable by either party at any time.
* * *

The only question to be determined is: Was the oral agreement made with the agent binding upon the company? Defendant in error cites the case of *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305, as being decisive of the case. Justice Comstock, in delivering the opinion, says:

"The alleged agreement on which the suit was founded was to renew a policy of insurance from year to year in consideration of a premium to be annually paid, either party being at liberty to give notice at any time that the arrangement would not be continued. Such an agreement, though not in writing, is not void by the statute of frauds, on the ground that 'by its terms it is not to be performed within one year from the making thereof.' 2 Rev. St. [1st Ed.] p. 135, § 2. It is not the meaning of the statute that the contract must be performed within a year. If it can be so performed consistently with the language in which the parties have expressed themselves,—in other words, if the obligation of the contract is not, by its very terms or necessary construction, to endure for a longer period than one year,—it is a valid agreement, although it may be capable of an indefinite continuance. An agreement which either party can terminate at any time by a notice to the other may be binding so long as the notice is not given, but it is not within the language or the policy of the statute. *Plimpton v. Curtiss*, 15 Wend. 336; *Moore v. Fox*, 10 Johns. 244 [6 Am. Dec. 338]; *Fenton v. Emblers*, 3 Burrows, 1278; 2 Pars. Cont. 316, and note.

"Aside from the objection just considered, contracts of insurance, whether executory or importing a present risk, are not required by any statute to be in writing; and we are therefore next to inquire whether, if made by parol, they are valid upon general principles of law. A policy of insurance is a mercantile contract, having its origin in, and deriving its incidents from, the usage and the laws of commercial nations. In many of the countries of Europe the contract is required to be in writing by positive ordinances, which set forth minutely the circumstances, and the stipulations, which it ought to express. 1 Duer, Ins. 61. The same is true of marine insurances in Great Britain, a written policy being required by the stamp act (35 Geo. III. c. 63). Such is, also, undoubtedly, the usage in this country; and, indeed, the very term 'policy' imports that the party insured holds a written instrument to which that name has been given. It seems, however, that even in the continental countries of Europe, where formal policies are required by the codes of public law, unwritten agreements to insure will in some circumstances be executed by the courts of justice. 3 Boulay Du Paty, 246; 2 Valin, 20; Pothier, *Traite du Contrat d'Assurance*, note, 96, 97.

"In this state we have no positive law on the subject. The contract, as I have said, had its origin in mercantile law and usage. It has, however, become so thoroughly incorporated into our municipal system that a distinction which denies the power and capacity of entering into agreements in the nature of insurance, except in particular modes and forms, rests upon no foundation. The common law, with certain exceptions, having regard to age, mental soundness, etc., concedes to every person the general capacity of entering into contracts. This capacity relates to all subjects alike concerning which contracts may be lawfully made; and it exists under no restraints in the mode of contracting, except those which are imposed by legislative authority. There is nothing in the nature of insurance which requires written evidence of the contract. To deny, therefore, that parol agreements to insure are valid, would be simply to affirm the incapacity of parties to contract where no such incapacity exists, according to any known rule of reason or of law. The supreme court of the United States, in a recent case in which the question directly arose, has determined that a parol agreement to make and deliver a policy of insurance need not be in writing. *Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 318 [15 L. Ed. 636]. We do not hesitate to adopt that conclusion, and it follows that the objection made at the trial to the agreement offered to be proved, so far as interests upon this ground, cannot be maintained."

A rehearing was granted in this case, and the last decision is reported in 28 N. Y. 153, where the law applicable to the facts in this case is approved. As bearing upon the validity of this contract, the following authorities are cited: *Insurance Co. v. Shaw*, 94 U. S. 574, 24 L. Ed. 291; *Campbell v. Insurance Co.*, 73 Wis. 100, 40 N. W. 661; *Insurance Co. v. Duffey*, 2 Kan. 347; *King v. Insurance Co.*, 58 Wis. 508, 17 N. W. 297. * * * The judgment of the district court is affirmed.

WIEBELER v. MILWAUKEE MECHANICS' MUT. INS. CO.

(Supreme Court of Minnesota, 1883. 30 Minn. 464, 16 N. W. 363.)

GILFILLAN, C. J. Action on a contract to insure. From the admissions in the pleadings and on the trial, and from the evidence, the referee was justified in finding, as he did find, that plaintiff held defendant's policy (about to expire) insuring his dwelling for three years for the sum of \$250, and that before it expired the agent of defendant, on its behalf, agreed orally with plaintiff to renew it, increasing the amount on the dwelling to \$400, and extending it so as to cover the furniture in the amount of \$250, and the barn to the amount of \$100. Nothing being said to the contrary,

the presumption would be that the renewal was to be for the same length of time and the same rate of premium as in the original policy, and the referee found the fact accordingly. This makes a good contract to insure for the term of three years.

Defendant claims that the contract was within the statute of frauds and void. There is included in the statute "every agreement that by its terms is not to be performed within one year from the making thereof." This, of course, does not include an agreement that may, in accordance with its terms, be fully performed and ended within the year; as where the thing to be done depends on a contingency that may happen within the time. This is the case with a contract to insure where the insurance is to commence within the year. Judgment affirmed.

COMMERCIAL FIRE INS. CO. v. MORRIS.

(Supreme Court of Alabama, 1894. 105 Ala. 498, 18 South. 34.)

COLEMAN, J.⁷ The plaintiffs, Morris & Co., sued the defendant upon an insurance contract to recover damages sustained in the loss of drugs, merchandise, etc., destroyed by fire. There are several counts in the complaint, one or more counting upon an agreement to insure, another upon a contract of insurance, and another upon an agreement to renew, and one upon an agreement of renewal of an existing policy of insurance alleged to have been made a few days before the period of its expiration. As this case must be reversed for reasons which will appear in the opinion, we deem it proper to state general rules which seem to us to govern the case, without considering specifically and in detail each of the several assignments of error.

First, we hold that neither an agreement to issue a policy of insurance, nor an agreement to renew an existing policy, nor a contract of insurance are within the statute of frauds, and such contracts or agreements need not be in writing.

Second, that a count which seeks a recovery upon a mere agreement to issue a policy or to procure a policy, or an agreement to renew an existing policy, which does not aver a breach of the agreement, is defective. A mere allegation that the defendant agreed to insure, or to renew a policy, followed by an averment of the loss and destruction of the property intended to be covered, does not show a breach of the agreement. We are aware that a similar count was held good in the case of Insurance Co. v. McMillan, 31 Ala. 711, but an examination of the case shows that the grounds of the demurrer assigned did not specifically raise the objection we are considering, and it was not passed upon by the court. In the later case of Insurance Co. v. Adler, 71

⁷ Part of the opinion is omitted.

Ala. 516, the character of the complaint is not stated, but the principle is declared that an action at law may be maintained upon a parol agreement to insure, "if all the terms of the contract were agreed upon, so as to cover the time of the loss, and the breach consisted in the failure to issue the policy as agreed on." Courts of equity entertain bills filed to enforce specific performance of parol agreements to insure, which would be wholly unnecessary if an agreement to insure was in legal effect, the same as a contract of insurance. Having jurisdiction to enforce specific performance, upon proper prayer, courts of equity administer full relief. *Insurance Co. v. Mayes*, 61 Ala. 163; *Tayloe v. Insurance Co.*, 9 How. 390, 13 L. Ed. 187; *Commercial Mut. Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 318-321, 15 L. Ed. 636.

In the case of *Lancaster Mills v. Merchants' Cotton-Press Co.*, 89 Tenn. 1, 14 S. W. 317, 24 Am. St. Rep. 586,—the court uses this language: "A contract to carry insurance or to cover with insurance, as a representation to a depositor that his deposit is insured, is very different in its legal effect from the absolute liability of an insurer. In the latter case the action is upon the risk or policy for the value of the property destroyed, if within the amount of the risk. In the other case the action would be for such damages as resulted from the breach of the obligation to carry insurance. The measure of damages may be the same." The demurrer to the second count raised this question directly, and probably the objection was applicable to other counts. The reasoning of the court in *Tayloe v. Insurance Co.*, 9 How. 405, 13 L. Ed. 187, is in direct line with our conclusion.

The authorities agree that before a contract of insurance, or to insure, is binding, all the essential elements and terms of the contract must be understood and mutually assented to. A mere expression of a desire by one intending to procure insurance, or a proposition made to an insurance agent to insure property, and an assent or acceptance by the agent to insure, without more, would not amount to a contract of insurance or an agreement to insure. The subject-matter, period, rate to be paid, and amount of insurance, and perhaps other elements, must be agreed upon expressly or by implication before there can be an absolute, binding agreement between the parties, nor would the mere fact that there had been previous dealings of insurance between the parties, alone, without some reference to such previous dealings, be sufficient to show a completed and binding contract that the parties intended to and did adopt the provisions of the former dealings. Where, however, there exists a contract of insurance, not expired, and there is an agreement between the parties to renew the policy, and no change is suggested or agreed upon, it will be implied that the renewal contract includes and adopts all the provisions of the existing contract of insurance. Such a contract is complete in all respects, and upon failure to comply with the agreement the party offending may be compelled, by bill in equity, specifically to perform the agreement, or held liable in a court of law for damages resulting from a breach of

the agreement. 31 Ala. 711; 71 Ala. 516; 61 Ala. 163; 9 How. 405, 13 L. Ed. 187; 89 Tenn. 1, 14 S. W. 317, 24 Am. St. Rep. 586.

Where the evidence shows that the parties contracted with reference to provisions of previous dealings, it is competent to show the terms of such previous dealings, in order to arrive at the intention of the parties, and to ascertain all the terms of the contract made; and, where the agreement was to renew an existing contract of insurance, it was proper and necessary to admit in evidence such existing contract of insurance. Whether or not there was a parol contract to insure, or a parol contract to renew or of renewal, was a question of fact to be determined by the jury. * * * Reversed.

SALISBURY v. HEKLA FIRE INS. CO. OF MADISON, WIS.

(Supreme Court of Minnesota, 1884. 32 Minn. 458, 21 N. W. 552.)

GILFILLAN, C. J. Defendant, by its agent at Minneapolis, made orally a contract with plaintiffs, acting by their agent, insuring plaintiffs' building used as a manufactory in the sum of \$150, and the stock and machinery therein in the sum of \$350, against loss by fire, for a premium at the rate of 6 per cent. on the amount of insurance for one year, the risk to commence at once, to-wit, February 17, 1883; a written policy to be made and delivered as soon as could be done. The premium was not then paid, and nothing was said as to when it should be. On the night of February 18th, the manufactory then running, the property insured was destroyed by fire. On the morning of the 19th, after the fire, defendant's agent delivered to plaintiffs' agent a policy of insurance. February 23d, plaintiffs paid the premium. In the oral agreement nothing was said about any conditions or restrictions of insurance. In the policy delivered there was a condition that it should be void if the manufactory should run at night or overtime, or cease to be operated, without the consent of defendant indorsed on the policy.

The controversy is as to whether that condition attached to the contract of insurance under which the loss occurred. Was that condition a part of the contract existing at the time of the fire? Unless it was, it has no influence on the rights of the parties. Whether it was or not must be determined by what was said between them or agents when the insurance was effected. The written policy made out by the defendant after the fire, of course, cannot be conclusive. Indeed, having been made after the liability accrued, it would be no evidence of the contract at all, were it not for its delivery to and retention by plaintiffs. Such delivery and retention may be taken as an admission by plaintiffs that it set forth the terms of the contract as agreed on, which might be rebutted by proof of what the contract actually was. And in view of the fact indicated by the evidence, that

the plaintiffs did not read it, it would not be very strong evidence, as an admission. It stands on an entirely different footing from a policy delivered and accepted before the loss. For in that case, if there be no fraud or mistake, the policy is the contract, (from the time of its delivery, at any rate,) no matter what may have been the negotiations which led to it, and proof of such negotiations is not admissible to contradict its terms.

This policy did not exist and was not the contract at the time of the fire, when defendant's liability accrued. The only contract then in force was oral, and the rights of the parties must be measured by it. Upon an oral contract of insurance, where nothing is said about conditions, if a policy is to be issued the parties are presumed to intend that it shall contain the conditions usually inserted in policies of insurance in like cases, or as have been before used by the parties. That a particular condition is usual must be shown by the party who insists upon it, who has the affirmative. There was no evidence that such a condition as this is usual. Order affirmed.⁸

III. Delivery ⁹

DIBBLE v. NORTHERN ASSUR. CO. OF LONDON.

(Supreme Court of Michigan, 1888. 70 Mich. 1, 37 N. W. 704, 14 Am. St. Rep. 470.)

Action upon a policy of fire insurance, brought by James R. Dibble, the assured, against the Northern Assurance Company of London. Verdict and judgment for plaintiff, and defendant brings error.

SHERWOOD, C. J.¹⁰ The defendant is a corporation organized under the laws of England, doing business in this state, in the county of Allegan, at which place Hollister F. Marsh was, in December, 1885 and 1886, its local agent. He was also such agent for the Sun Fire Insurance Company. The plaintiff lived at Salem, in Allegan county, where he owned a store building in which was a stock of goods, both of which were insured in the defendant company. He also owned the two dwelling-houses described in the policy in this suit. The agent, Mr. Marsh, lived at Allegan village, some 14 miles distant from the plaintiff and his property, and was assisted in his insurance business by his son, Arthur Marsh. The plaintiff had for several years previ-

⁸ Conditions to which an oral contract is subject, see *Hicks v. British American Assur. Co.*, ante, p. 101.

⁹ For discussion of principles, see *Vance on Insurance*, § 66. See, also, *Cooley, Briefs on the Law of Insurance*, vol. 1, pp. 442-461.

¹⁰ Part of the opinion is omitted.

ous to the time of issuing the policy in this suit placed his insurance with Marsh, and had given Marsh, the agent, authority to keep his property insured in such companies as Marsh might select, and to renew his policies whenever necessary for that purpose.

On December 19, 1885, Arthur Marsh was at Salem; saw Dibble, who applied to him specifically for the insurance on the dwelling-houses described in the policy in this suit. The application was verbal, and the selection of the company in which to place the insurance was left to the agent, Mr. Marsh. On the return of Arthur to Allegan, he reported the application to the agent, who, on the 21st day of December, in pursuance of such application, placed the insurance in the Sun Company, entered the same on his books of that company, and sent the policy to the plaintiff. He also reported the policy to the company, and advanced the premium given him by Marsh. This policy contained the following clause: "The insurance may also be terminated at any time, at the option of the society, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy."

January 1, 1886, the Sun Company notified Marsh, the agent, to cancel the policy, which he did in the usual way, and notified the plaintiff of the fact the same day by letter, which reached Salem the next day, which was Saturday; and in the same letter Marsh notified the plaintiff he (Marsh) had put the plaintiff's insurance in another company. At that time the plaintiff was absent from his home. His clerk, however, received the letter, and opened and read it. The agent, as soon as he canceled the Sun policy, placed the risks in the defendant's company, issued the policy in suit, and placed it in his safe for the plaintiff; entered the policy on his daily register of the company's business, reported it to the defendant company, accompanied by the premium, which was three dollars, using the returned premium from the Sun Company, advanced the balance, and charged the same to the plaintiff, who, as soon as he learned the facts, approved and ratified all Marsh had done for him in the premises.

The fire occurred, which did the damage to the buildings insured, on the Sunday evening after the policy was issued. It is for this injury the plaintiff brings this suit against the defendant under its policy. The defendant, disavowing its liability upon the policy, on March 13, 1886, returned the premium it had received thereon to its agent, Marsh, who, under the direction of the company, tendered it back to the plaintiff, and he refused to accept the same. If the plaintiff is entitled to recover, the amount is not disputed, nor is any question made upon the proofs of loss. The facts are substantially undisputed. The plaintiff was allowed to recover in the circuit, where a trial was had before Judge Arnold and a jury. The defendant brings error.

An inspection of the record under the exceptions taken in receiving the testimony discloses no error. The defendant's position in regard

to the policy in question is stated by his counsel as follows: "The defendant's position in regard to this policy may be briefly stated thus: (1) The policy was never delivered. (2) The policy in suit was intended to take the place of the Sun fire office policy, which was supposed to be canceled. The Sun fire office policy was never canceled; ergo, defendant's policy never took effect. (3) Defendant's policy was issued by Marsh acting as defendant's agent, and was accepted by him acting as plaintiff's agent, if it was ever accepted, as it is uncontradicted and undisputed. (4) That plaintiff did not know of this policy until after the fire. (5) That he never ordered it to be issued. And we claim that a policy of insurance made by one person acting at the same time as agent for both parties thereto is void at the election of either party, unless they have full knowledge of how the same was made."

We have no doubt but that the facts shown upon the trial were sufficient to establish the delivery claimed of the policy in question to the plaintiff. The cancellation of the Sun policy was sufficiently proved, if the jury believed the testimony in the case, and their verdict is against the defendant. Under the arrangement with the agent, as stated by himself, the consent of the plaintiff to a cancellation of the policy was not necessary. The selection of the companies in which plaintiff was to have his property kept insured was placed at the discretion of the agent. The plaintiff's knowledge, or want of knowledge, upon that subject could not affect the issue in this case under the contract the plaintiff claims to have had with the agent.

While Marsh could not act for both parties in making the contract of insurance, or upon any other matters relating to the business requiring the concurrence of both parties, he could act as the custodian of the policy which was issued for the plaintiff, until he should call for it. This was a matter in which the company had no interest, and over which it had no control whatever, and, when the agent received it for the plaintiff for that purpose, it was clearly a delivery by the company. From the day the agent received the order for the insurance until the property burned, he had the direction of the plaintiff to issue the policy, and after it was issued and delivered neither party could modify or cancel the contract without some special authority so to do from the other. * * * Affirmed.

IV. Payment of First Premium ¹¹

UNION CENTRAL LIFE INS. CO. v. TAGGART.

(Supreme Court of Minnesota, 1893. 55 Minn. 95, 56 N. W. 579, 43 Am. St. Rep. 474.)

Action on several promissory notes by the Union Central Life Insurance Company against James R. Taggart. Plaintiff had judgment, and defendant appeals.

MITCHELL, J. The notes in suit were executed for part of the first year's premium on a policy of insurance on the life of the defendant. One of the conditions annexed to the policy was that it "shall not be valid or binding until the first premium is paid to the company or its authorized agent."

The main contention of the defendant, and the only one we deem it necessary to consider, is that there was an entire want of consideration for the notes, for the reason that, under the condition quoted, the policy never became operative, because the first year's premium had not been paid in cash. There is clearly nothing in this point. It is usually provided that the policy, though delivered, shall not be binding until the premium is paid; and, where this is the case, the policy does not take effect, even though delivered, until the provision is complied with. But the mode of payment of the premium is immaterial if it be accepted by the company or its agent, and no special mode be provided for in the policy. The policy was silent as to the mode of payment. It was delivered with a receipt for the first year's premium attached, countersigned by the company's agent, who accepted defendant's notes for part of it. On this state of facts, even in the absence of any express agreement to that effect, the company must, in judgment of law, be deemed to have accepted the notes in payment of the premium. See *Tayloe v. Insurance Co.*, 9 How. 390-402, 13 L. Ed. 187.

This constituted a consideration for the notes. There is no other point in the case worthy of any special consideration. Order affirmed.

¹¹ For discussion of principles, see *Vance on Insurance*, § 67. See, also, *Cooley, Briefs on the Law of Insurance*, vol. 1, pp. 461-496.

Payment of premiums under conditions of policy, see post, pp. 138, 189.

TOMSECEK v. TRAVELERS' INS. CO.

(Supreme Court of Wisconsin, 1902. 113 Wis. 114, 88 N. W. 1013, 57 L. R. A. 455, 90 Am. St. Rep. 846.)

Action by Josephine Tomsecek and others against the Travelers' Insurance Company. Appeal from a judgment in favor of plaintiffs. The defense was noncompliance with the following condition of the insurance contract: "All premiums are payable at the home office in Hartford, Connecticut, but will be accepted if paid to an agent in exchange for a receipt signed by its president or secretary and countersigned by the agent designated thereon. This policy shall not take effect unless the first premium is paid while the insured is in good health."

The evidence was to the following effect: Maurice M. Enright and Vincent J. Tomsecek were copartners in the business of running a meat market at the time the policy was issued. By the consent of Enright, Tomsecek and one Webb, agent for the defendant company, agreed that Tomsecek should take out a policy of life insurance in such company, paying the first premium by giving such agent credit on account at the meat market, as payment for meat furnished and to be furnished, to the extent thereof. An application was accordingly made to the company in due form, no mention being made of the agreement aforesaid. The application was accepted and a policy containing the condition before mentioned was forwarded to the agent for delivery, who sent it to Tomsecek by mail, not knowing that the latter was ill. Tomsecek was then in a hospital, too ill to do business. The policy was received at the place of business of Enright & Tomsecek, but was never brought to the latter's knowledge. It remained under seal as taken from the post office till after he died. That occurred soon after the policy was received. No credit for the first payment on the policy was ever given to the agent as agreed upon, nor was such premium ever paid in any way.

The court excluded all evidence as to whether the agent had authority to accept anything in payment of the first premium upon the policy except money, upon the theory that the controversy in that regard was to be solved solely by the writings. It was in effect admitted by plaintiffs' counsel on the trial that no payment was made on the policy in money or otherwise, unless the agreement in regard to payment being made by credit to the agent at the meat market operated as payment.

MARSHALL, J.¹² * * * The learned trial court rightly decided that if the agreement between Tomsecek and appellant's agent, that the first premium on the policy might be paid otherwise than in money, and the delivery of the policy pursuant to such agreement,

¹² Part of the opinion is omitted and the statement of facts is rewritten.

constituted a waiver by the company of payment of such premium and of the condition that the policy should not take effect unless such payment should be made while Tomsecek was in good health, then the policy took effect before Tomsecek died and plaintiffs were entitled to recover; otherwise appellant is entitled to judgment. Was the decision of that question in respondents' favor right? That is the proposition upon which this appeal turns.

Many authorities are cited to our attention to the effect that possession of a policy by the assured at the time of his death *prima facie* establishes all conditions necessary to its having taken effect as a binding insurance contract in his lifetime, notwithstanding it contains a stipulation that it shall not take effect unless the first premium is paid while the assured is in good health; that if such payment was not in fact made, a waiver thereof will be presumed in the absence of evidence to the contrary. Some of such authorities hold to rather an extreme doctrine when applied to a policy which does not contain a receipt for payment of the first premium and indicates that an independent instrument, evidencing such payment, is to be delivered to the assured upon such payment being made, as in this case. To that extent they are not in harmony with *McDonald v. Society*, 108 Wis. 213, 84 N. W. 154, 81 Am. St. Rep. 885, and do not meet with our approval. The trial court applied the doctrine of such authorities to this case, and in that, as it seems, committed error. The court went further, not only holding that the agent waived and had implied authority to waive payment of the first premium while the applicant for insurance was in good health, but waived and had authority to waive payment of such premium in money and to make an agreement, binding on appellant, that payment might be made by applying the amount of the premium on the agent's indebtedness for meat and as a credit entitling him to further delivery of meat. The principle is familiar that the authority of an agent as to waiving conditions of an insurance policy before it takes effect is pretty broad, but it does not go beyond his actual authority and that reasonably implied from the nature of the business carried on. The rule in that regard is the same in respect to an agent for an insurance company as any other. There is no claim that the agent had actual authority to make the agreement found by the jury, so his authority in that regard must be tested wholly by what may be reasonably implied. It may be admitted that Webb was a general agent, and still the difficulty is not lessened, because it cannot be implied that he had any authority in excess of the power of the corporation, and it must be presumed that such power did not include the issue of policies of life insurance for anything but money.

Several cases are cited to our attention to sustain the decision that an agent may waive the conditions of an insurance policy calling for payment of the first premium in money, but none of them fit

the facts of this case. The nearest approach to a situation similar to the one under consideration is that involved in *Insurance Co. v. Schlink*, 175 Ill. 284, 51 N. E. 795. There the agent agreed to waive payment in money of a part of the first premium, such part not exceeding the amount allowed to him as his commission. The policy was sustained upon the ground that payment of the full amount going to the company was made in money, the court inferentially holding that the agent had no authority to waive payment thereof. The decision followed *Insurance Co. v. Ward*, 90 Ill. 545, where the agent agreed to take part payment of the first premium out of the assured's saloon. In respect to the defense of nonpayment of the first premium in money, the court said: "As the amount paid in cash was more than enough to pay the premium on this policy, we see no ground for holding that the premium was not all paid in cash." The agent "was entitled to commissions for procuring the insurance, and if he saw proper to take out his commissions in the saloon, we know of no reason or authority to debar him from doing so."

So many loose expressions are found in text-books and legal opinions as well, as to the power of a general agent of an insurance company to waive the conditions of a policy calling for payment of premiums in money, that it is not to be wondered at that attorneys and courts as well sometimes go astray. A careful analysis of the authorities will show that with few exceptions, which are not of sufficient significance to be followed, the idea, that the agent of an insurance company has implied authority to waive payment of premiums on an insurance policy in money and agree to take something in lieu thereof which is neither money nor an agreement to pay money, nor an equivalent to money to the insurance company when taken, has no support. In *May, Ins. § 360d*, it is said: "An agent authorized to deliver policies and receive payment may waive the payment of the premium in cash notwithstanding a stipulation in the policy to the contrary," citing *Insurance Co. v. Gilman*, 112 Ind. 7, 13 N. E. 118.

In that case the agent agreed to receive credit on his own debt to the assured for the amount of the first premium and to pay the insurance company the amount thereof, which agreement was fully carried out, the company actually receiving payment in money. The decision was grounded on the fact that the company received cash for the first premium, substantially according to the contract. The court said: "We are not required to decide what the rights of the parties would have been in case * * * the agent had failed to give the company credit and remit in the usual course." However, the court quoted, without explanation or qualification, and in a way to lead one astray if he fails to examine the supporting authorities, from section 360 of *May, Ins.*, this language: "If the agent be authorized to receive the premium, an agreement between

the assured and the agent that the latter will be responsible to the company for the amount, and hold the assured as his personal debtor therefor, is a waiver of the stipulation in the policy that it shall not be binding until the premium is received by the company or its accredited agent," citing *Sheldon v. Insurance Co.*, 25 Conn. 207, 65 Am. Dec. 565; *Insurance Co. v. Curtis*, 32 Mich. 402; *Willcuts v. Insurance Co.*, 81 Ind. 300, 309.

The text in *May* is supported by *Sheldon v. Insurance Co.*, supra, and *Insurance Co. v. Booker*, 9 Heisk. (Tenn.) 606, 24 Am. Rep. 344. In the last case mentioned the agreement was to the effect that the agent should give the assured time to make the first payment. There was no waiver of payment in money. In *Sheldon v. Insurance Co.*, the facts were that the agent agreed to give the applicant time to make payment of the first premium, to take his note, payable to the company on short time for one half thereof, and his promise to pay such agent the other half, and to personally make the cash payment to the company. It was the custom between the company and the agent to charge the amount of the first premium to the latter upon forwarding to him the policy for delivery, and for the agent to make settlements with the company from time to time, and to remit money on account. There was no waiver of the payment in money, only a waiver of the time of payment. In *Insurance Co. v. Curtis*, the agent advanced the money for the assured for the first premium, actually paying it to the company, and it was held that there was a sufficient compliance with the provision of the policy requiring payment of the first premium as a condition of the policy going into effect. In *Willcuts v. Insurance Co.* the facts were that the policy was issued to one of the medical examiners of the company and it was agreed between him and the agent that the dues to the applicant for services as medical examiner might be applied on the premiums. It was held that such agreement was binding on the company as to services actually rendered before the premium became due, because, to that extent, it did not really constitute a waiver of payment in money, as the amount due to the examiner from the company was equivalent to it to a cash payment to that extent.

Enough has been said to indicate the character of the authorities relied upon to show that a general agent of an insurance company has implied authority to waive the provision of an insurance policy calling for payment of the first premium in money. None of them go to the extent of holding that the agent may waive such payment and take something in lieu thereof which does not amount to payment to the corporation in cash, such as an agreement on the part of the agent to take pay for a premium in meat, no credit being given or payment actually made to the agent, or credit being given by him to the corporation in the usual course of business.

The precise question we have here was decided in *Hoffman v. Insurance Co.*, 92 U. S. 161, 23 L. Ed. 539. There the first premium was paid to a local or special agent, by consent of the general agent of the company, in a horse, the cancellation of an indebtedness of the special agent to the applicant for insurance, a note to such agent and a note to the corporation. The transaction was held void. Swayne, J., who delivered the opinion of the court, saying: "It is an elementary principle, applicable alike to all kinds of agency, that whatever an agent does can be done only in the way usual in the line of business in which he is acting;" and the implication to that effect "is present whenever his authority is called into activity, and prescribes the manner as well as the limit of its exercise."

It was further said, in effect, that as life insurance is a cash business, the agent of an insurance company, whether he be a general or a special agent, has no implied authority to take or agree to take personal property, such as a horse, in payment of a premium upon an insurance policy; that such an agreement, even if made by the company itself, would be ultra vires, and if made by an agent without the knowledge of the company it would not only be ultra vires but a fraud both upon the part of the agent and the applicant for insurance, for the latter must be presumed to know that an insurance premium cannot be legitimately paid in horses.

It would seem that nothing further need be said to show that the policy in question never became binding upon appellant. The jury found that the agent agreed to accept his own indebtedness for meat as part payment for the first premium and to take meat for the balance thereof. It is undisputed that such agreement was never carried out by the insured so as to obligate the agent to pay the company. Neither the company nor the agent received pay for the first premium. There is no analogy between this case and one where the agent merely agrees to give the applicant for insurance time to make the first payment, or agrees that he will advance the amount of the first payment himself, and actually does advance it, or agrees to charge himself with the first premium in his account with the company, according to a custom of doing business between himself and his principal, thereby becoming liable to the company. We must hold here that the agent had no implied authority to use the appellant's policy of insurance to pay his meat bills or to build up a credit for future purchases of meat. There are no circumstances disclosed in the evidence to avoid the effect of that conclusion. * * * Reversed.¹³

¹³ Power of agent to waive conditions of the policy, see post, p. 243.

FARNUM v. PHENIX INS. CO.

(Supreme Court of California, 1890. 83 Cal. 246, 23 Pac. 869, 17 Am. St. Rep. 233.)

Action by N. C. Farnum and others against the Phenix Insurance Company. There was a judgment of nonsuit, and plaintiffs appeal. On May 2, 1887, the plaintiffs applied verbally to the defendant's agent at Stockton, Cal., for a policy of insurance on certain buildings. A policy was issued insuring the buildings for five years from May 1, 1887. A loss occurred under the policy September 5, 1887. At the time of the fire and loss no part of the premium had been actually paid, but it was in evidence that the local agent of the defendant, at the time the policy was issued and delivered, verbally agreed and promised to give the plaintiffs a credit on the premium until October 1, 1887, and that the policy was taken by plaintiffs with that understanding, and upon that condition, though the agreement for such credit was not indorsed in writing upon the policy. The policy was countersigned by the local agent, and delivered to plaintiffs, on May 24, 1887. It was admitted that it was the custom of defendant to allow its agents to give credit for premiums for the term 60 days; and it was proved that the local agent was, by virtue of his appointment, made responsible for the collection of all premiums on policies issued by him.

On June 25, 1887, the local agent mailed to plaintiffs a written notice stating that "the premium on policy No. 73,143, on barn, tank, etc., \$1,200, amounting to \$73.50 on five-years policy, falls due on the 1st of July," and inclosed in the same envelope was a notice that, "unless the premium thereon shall be paid on or before 12 o'clock noon of July 1, 1887, we shall cancel the insurance under said policy on our books, for non-payment of premium, without further notice, and terminate our liability thereunder from that date." Neither of the plaintiffs actually received said notice. At the expiration of the time named in the notice, the premium being still unpaid, the general agents of defendant at San Francisco made an entry in the books in their office to the effect that the policy was canceled, but no notice of the cancellation was given to either of the plaintiffs. On September 30, 1887, plaintiffs tendered to the local agent of defendant the full amount of the premium, which he refused to receive. The policy recites a consideration of \$73.50, but does not expressly acknowledge receipt of payment. It contains the usual conditions of fire policies.

The following clauses are the only ones relevant to the points to be considered: "The company shall not be liable by virtue of this policy, or any renewal thereof, until the premium therefor be actually paid." "The use of general terms, or anything less than a distinct specific agreement, clearly expressed, and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or re-

striction herein." "The insurance may be terminated at any time, at the option of the company, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term of the policy."

VANCLIEF, C.¹⁴ * * * The defendant contends that there is no liability upon the policy, because the premium was not actually paid before the loss, and because the agreement for credit was not indorsed in writing upon the policy. It seems to be settled by a controlling preponderance of authority that an express provision in a policy of insurance that the company shall not be liable on the policy until the premium be actually paid, is waived by the unconditional delivery of the policy to the assured as a completed and executed contract, under an express or implied agreement that a credit shall be given for the premium; and that in such case the company is liable for a loss which may occur during the period of the credit. *Boehen v. Insurance Co.*, 35 N. Y. 131, 90 Am. Dec. 787; *Wood v. Insurance Co.*, 32 N. Y. 619; *Goit v. Insurance Co.*, 25 Barb. (N. Y.) 190; * * * *Church v. Insurance Co.*, 66 N. Y. 222; * * * *Latoix v. Insurance Co.*, 27 La. Ann. 113; * * * *Heaton v. Insurance Co.*, 7 R. I. 506; *Eagan v. Insurance Co.*, 10 W. Va. 583; * * * *O'Brien v. Insurance Co. (C. C.)* 22 Fed. 586; *Tennant v. Insurance Co. (C. C.)* 31 Fed. 322; *Insurance Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689; *Young v. Insurance Co.*, 45 Iowa, 378, 24 Am. Rep. 784; *Wagon Co. v. Insurance Co. (C. C.)* 20 Fed. 232; *Post v. Insurance Co.*, 43 Barb. (N. Y.) 351; *Van Schoick v. Insurance Co.*, 68 N. Y. 440.

The reason for this rule is well expressed in the case last above cited, as follows: "The fact that the insurer delivered to the insured the written contract as the consummated agreement between them, and did not then exact present payment of the premium, as a necessary precedent to delivery, was too plainly in contradiction with the condition for prepayment for it to be supposed that it was meant by the insurer, or supposed by either party, that it was intended to make that condition a potent part of the contract. * * * It would be imputing a fraudulent intent to the defendant in this case to say or to think that they did not mean, when they delivered this policy to the plaintiff, to give him a valid and binding contract of insurance, or that they did not mean that he should believe that he had one, or that they did not suppose that he did so believe." In *Insurance Co. v. McCrea*, 8 Lea (Tenn.) 520, 41 Am. Rep. 647, it is said: "It seems to be well settled that, when a contract of insurance is executed with a full knowledge of an existing fact which would render it void under a condition precedent embodied therein, the condition or its breach will be considered as waived, because otherwise it would be an unmeaning form, the only effect of which would be to deceive and defraud."

¹⁴ Part of the opinion is omitted and the statement of facts is rewritten.

In *Tennant v. Insurance Co.*, supra, Ross, J., holds that an extension of credit for an insurance premium pursuant to custom, by an agent having power to countersign a renewal receipt upon a life-policy, made the renewal of the policy binding in favor of the assured, notwithstanding the terms of the policy making the actual payment of the premium a condition precedent to the binding force of the renewal, and notwithstanding the death of the insured before the payment of the premium, and assigns as the reason for so holding that "it would manifestly operate as a fraud upon him to hold that the insurance did not become operative until the premium was actually paid." It should also be remarked that it would be manifestly unjust for an insurance company, which extends the time for the payment of the premium upon an executed and delivered policy, to charge the full amount of premium upon the risk for the entire period covered by the policy, and to accept such full amount at the expiration of that period if no loss occurred meanwhile, and yet to deny the validity of the policy, and its liability upon it during the period of credit, in case a loss should occur during that period.

In this case the local agent of defendant at Stockton had unquestionable power to extend a credit upon the premium for the period of at least 60 days. He represented the full power of the company to make a consummated and binding contract of insurance by countersigning and delivering the policy; and when he countersigned and delivered it unconditionally as a completed contract, under a specific agreement for payment of the premium at a future date, he thereby waived, to the full extent to which the company itself could then have waived, the actual payment of the premium as a condition precedent to its liability on the policy. "An insurance agent, clothed with authority to make contracts of insurance or to issue policies, stands in the stead of the company to the assured." *Rivara v. Insurance Co.*, 62 Miss. 728.

In *Insurance Co. v. Block*, 109 Pa. 538, 1 Atl. 523, it was held that the counter-signature of an authorized agent upon a policy which is unconditionally delivered by him to the insured, and which, by its terms, requires such counter-signing to make it valid, is a virtual acknowledgment of the receipt of premium, and estops the company to deny the validity of the policy, upon the ground that the premium was not actually received by the officers of the company.

The policy in this case does not formally express receipt of premium, but it recites a consideration of \$73.50 for the contract of insurance, and declares that the policy shall not be binding until countersigned by the agent at Stockton, and thus impliedly authorizes him to consummate a binding contract of insurance for the consideration expressed. If the policy had contained a formal receipt of premium, its unconditional delivery would have been conclusive evidence of payment, so as to have estopped the defendant from denying the validity of the policy, notwithstanding the declaration in it that it shall

not be binding until the premium is actually paid (Civil Code, § 2598: *Basch v. Insurance Co.*, 35 N. J. Law, 429; *Insurance Co. v. Fennell*, 49 Ill. 180); and upon principle the same result should follow where the policy is delivered as a valid and completed contract, upon a consideration expressed therein, the receipt of which is impliedly acknowledged, an authorized credit having been agreed upon as an equivalent and substitute for cash payment. The promise to pay the premium at a future time was a sufficient consideration for the contract to insure, as there can be no question that the promise to pay at a future day was binding on the plaintiffs, and could have been enforced by the defendant.

It is no answer to this to say that the Stockton agent was not authorized to give so long a credit as that given in this case,—from May 2 to October 1, 1887,—but was limited to a credit of 60 days; for it is sufficient that he had authority to give a credit of 60 days. The credit given was a valid credit for 60 days, at least, and the giving of any credit by authority of the company was a waiver of actual payment as a condition precedent to the liability of the company. The only remedy of the company thereafter was to rescind or to cancel the policy for non-payment of the premium within the 60 days, upon personal notice to the plaintiffs, which the bill of exceptions shows was not received by either of the plaintiffs. When credit is given by an insurance company it has no right to cancel the policy for non-payment of premium, except after putting the insured in default (*La-toix v. Insurance Co.*, 27 La. Ann. 113), and personal notice of intended cancellation must be given to the insured (*Insurance Co. v. Turnbull*, 86 Ky. 230, 5 S. W. 542). If the notice is sent by mail, and not received, as in this case, the cancellation for non-payment of premium is ineffective. *Mullen v Insurance Co.*, 121 Mass. 171.
* * *

Again, the local agent at Stockton, being clothed with general power to receive proposals for insurance and to countersign and deliver policies in San Joaquin county, is presumed to have the power of the company within that county to waive the immediate payment of premiums, and to make contracts for credit. *Wagon Co. v. Insurance Co.* (C. C.) 20 Fed. 232; *Post v. Insurance Co.*, 43 Barb. (N. Y.) 351. Whether an agent has general or only particular powers is not determined by simply calling him a local agent. *Murphy v. Insurance Co.*, 3 Baxt. (Tenn.) 448, 27 Am. Rep. 761. An agent who, under general instructions from the home office, has authority, within a certain territory, to deliver policies and receive premiums, is a general agent, and has authority to waive cash payment. *Insurance Co. v. Booker*, 9 Heisk. (Tenn.) 606, 24 Am. Rep. 344. A local insurance agent is presumed to have power co-extensive with the business intrusted to his care, and his powers will not be narrowed by limitations not communicated to the person with whom he deals. *Baubie v. Insurance Co.*, 2 Dill. 156, Fed. Cas. No. 1,111. Where, by

the terms of a policy, a particular local agent is to countersign it to make it valid, so that the insured must deal with him and no one else, he represents the power of the company, so that any policy which he countersigns binds the company to any person insured through his agency, who has no notice of limitation of his power, though he may have exceeded his authority, and violated his duty to his principal. *Insurance Co. v. Earle*, 33 Mich. 151, 153; *Viele v. Insurance Co.*, 26 Iowa, 58, 96 Am. Dec. 83; *Murphy v. Insurance Co.*, 3 Baxt. (Tenn.) 440, 27 Am. Rep. 761; *Whited v. Insurance Co.*, 76 N. Y. 415, 32 Am. Rep. 330.

A local agent having ostensible general authority to solicit applications and make contracts for insurance, and to receive first premiums, binds his principal by any acts or contracts within the general scope of his apparent authority, notwithstanding an actual excess of authority. *Insurance Co. v. Wilkinson*, 13 Wall. 234, 20 L. Ed. 617; *Insurance Co. v. Neyland*, 9 Bush (Ky.) 436; *Rivara v. Insurance Co.*, 62 Miss. 721; *Insurance Co. v. McLanathan*, 11 Kan. 533; *Insurance Co. v. Kasey*, 66 Va. 271, 18 Am. Rep. 681; *Wheaton v. Insurance Co.*, 76 Cal. 415, 18 Pac. 758, 9 Am. St. Rep. 216; *Insurance Co. v. Barnes*, 41 Kan. 161, 21 Pac. 165; *Insurance Co. v. Hogue*, 41 Kan. 524, 21 Pac. 641. By the authorities above cited it appears that the plaintiffs were entitled to the whole term of the credit for which they contracted, through the defendant's local agent, and could not thereafter be put in default for a failure to pay or tender the premium before the expiration of the period of credit actually given. That credit from May 2 until October 1, 1887, was actually given, must be assumed as a fact for the purposes of the motion for a nonsuit. * * *

It also appears by the terms of the written appointment of the local agent that he was made responsible to the company for the collection of all premiums on policies issued by him, and that it was the custom of the company to allow its agents to give a credit of 60 days on premiums. From these facts it may fairly be inferred that the company was content to substitute the personal liability of the agent for the condition of prepayment of the premium. *Elkins v. Insurance Co.*, 113 Pa. 386-394, 6 Atl. 224; *Insurance Co. v. Hoover*, 113 Pa. 591, 8 Atl. 163, 57 Am. Rep. 511; *Insurance Co. v. Elkins*, 124 Pa. 484, 17 Atl. 24, 10 Am. St. Rep. 608. * * *

The next important question relates to the effect of the provision in the policy that "the use of general terms, or anything less than a distinct specific agreement, clearly expressed, and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction herein." So far as such provision has been held to constitute a limitation upon the power of agents, it has been applied to cases of waiver of conditions made after the signing and delivery of the policy as a consummated contract, such as the waiver of conditions relating to assignment of the policy, to increase of risk,

or to occupancy of the insured premises. *Shuggart v. Insurance Co.*, 55 Cal. 408; *Gladding v. Association*, 66 Cal. 6, 4 Pac. 764; *Enos v. Insurance Co.*, 67 Cal. 621, 8 Pac. 379; *Walsh v. Insurance Co.*, 73 N. Y. 5. In the last case cited, it is expressly held that the conclusion that such a provision limits the power of agents after the policy has been delivered, and the restriction upon their power to waive conditions as to the use or vacancy of the premises, known to the insured, "does not interfere with that class of cases which have established that conditions for pre-payment of premiums and the like which enter into the validity of the contract of insurance at its inception, may be waived by agents, and are waived, if so intended."

It has been expressly adjudged by the supreme court of Iowa, in a well-considered case, that the insured is not bound to take notice of the conditions in the policy that the premium must be actually paid, nor of the provision that the waiver of condition must be indorsed in writing on the policy when the policy is executed and delivered to him as a valid and completed contract, by an agent having authority to countersign it, and who before or at the time of the delivery of it has given the insured a credit upon the premium by parol; and that, if a loss occurs in such case before the credit expires, the company is bound, notwithstanding that the agreement for credit was not indorsed upon the policy. *Young v. Insurance Co.*, 45 Iowa, 378, 24 Am. Rep. 784.

And it has been repeatedly held that where any fact, which would constitute a breach of a condition precedent to any liability of the company on the policy, is fully known to an agent of the company, local or general, who is authorized to consummate the contract of insurance, the knowledge of such agent is the knowledge of the company, and his act in executing and delivering the policy, as a valid and completed contract, is an exercise of the power of the company, and constitutes a waiver by the company of such condition precedent, and also a waiver of the general requirement that waivers or conditions expressed in the policy shall be in writing indorsed on the policy. *Van Schoick v. Insurance Co.*, 68 N. Y. 434; *Whited v. Insurance Co.*, 76 N. Y. 418-421, 32 Am. Rep. 330; *Insurance Co. v. McCrea*, 8 Lea (Tenn.) 513-520, 41 Am. Rep. 647; *Insurance Co. v. Jones*, 62 Ill. 458; *Insurance Co. v. Earle*, 33 Mich. 151-153; *Viele v. Insurance Co.*, 26 Iowa, 58, 96 Am. Dec. 83; *Murphy v. Insurance Co.*, 3 Baxt. (Tenn.) 440, 27 Am. Rep. 761; *Geib v. Insurance Co.*, 1 Dill. 449, Fed. Cas. No. 5,298; *Devine v. Insurance Co.*, 32 Wis. 471; *Pelkington v. Insurance Co.*, 55 Mo. 172; *Insurance Co. v. Lyons*, 38 Tex. 253; *Insurance Co. v. Hall*, 12 Mich. 202; *Carroll v. Insurance Co.*, 38 Barb. (N. Y.) 402; *Manufacturing Co. v. Insurance Co.*, 2 Paine, 501, Fed. Cas. No. 17,206; *Insurance Co. v. Schettler*, 38 Ill. 166.

It is also well settled that an insurance company cannot so limit its capacity to contract by general stipulations against waiver of conditions, or that its contracts or waivers must be in writing, that it can-

not, by its agents, make an oral contract or an oral waiver not forbidden by the statute of frauds. *Trustees v. Insurance Co.*, 19 N. Y. 305; *Insurance Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689; *Car-rugi v. Insurance Co.*, 40 Ga. 141, 2 Am. Rep. 567; *Lamberton v. Insurance Co.*, 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222; *Insurance Co. v. Earle*, 33 Mich. 153; *Renier v. Insurance Co.*, 74 Wis. 89, 42 N. W. 208; *Steen v. Insurance Co.*, 89 N. Y. 326, 42 Am. Rep. 297.

Whether or not any particular agent has the general power of the company to make an oral contract, or an oral waiver of a condition, notwithstanding the provision in the policy requiring a writing, is a question of fact. *Insurance Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689; *Steen v. Insurance Co.*, 89 N. Y. 326, 42 Am. Rep. 297. * * * Reversed.¹⁵

V. What Papers Form the Written Contract¹⁶

REYNOLDS v. ATLAS ACCIDENT INS. CO. OF BOSTON.

(Supreme Court of Minnesota, 1897. 69 Minn. 93, 71 N. W. 831.)

Action by Eva T. Reynolds against the Atlas Accident Insurance Company of Boston. From an order dismissing the action, plaintiff appeals.

MITCHELL, J.¹⁷ In April, 1893, the defendant issued to George L. Reynolds an accident insurance policy, whereby, "in consideration of the warranties and agreements contained in the application indorsed hereon," it accepted him as a member of the company, "and subject both to the conditions, agreements, and limitations herein contained, and to all conditions indorsed hereon," insured him against the effects of bodily injuries caused solely by external violent and accidental means in various sums, according to the nature and extent of the injury, in case it did not result in death; but "if such injury alone shall result in the death of the insured, within ninety days thereafter the company will pay \$5,000 to Eva T. Reynolds, his wife, if surviving." Among the conditions printed on the back of the policy were the following: "The application for membership is made a part of this contract, and printed thereon. Fraud or concealment in ob-

¹⁵ As to power of agent to waive payment of first premium, see *Tom-secek v. Travelers' Ins. Co.*, ante, p. 116.

Power of agents to waive conditions of policy, generally, see post, pp. 243, 253.

¹⁶ For discussion of principles, see Vance on Insurance, § 68. See, also, Cooley, Briefs on the Law of Insurance, vol. 1, pp. 682-690.

¹⁷ Part of the opinion is omitted.

taining membership * * * shall make this contract and insurance void. The provisions and conditions aforesaid * * * are conditions precedent to the insurance hereof, and to its validity and enforcement."

Reynolds' application for membership, signed by him, stated that: "Membership to be based upon the following statement of facts, which are warranted by me to be true and complete." This application was all printed, except Reynolds' answers to the questions propounded to him, and his signature. It contained 17 questions to be answered by the applicant, 5 of which required categorical answers of "Yes" or "No." The sixteenth question was, "Have you ever had paralysis, or fits of any kind, or are you subject to or affected by any bodily or mental infirmity, or have you suffered the loss of a limb?"

It appeared that the answers were all in the handwriting of an agent of the defendant who took Reynolds' application, but who had no personal recollection of the transaction at the time of the trial. The answers to the questions requiring categorical answers, including the sixteenth, were indistinctly written, all of them appearing to consist of the letter "n" followed by a part of the letter "o." None of them had any resemblance to the word "Yes," and, as suggested by the trial judge, we think "an inspection of the application would satisfy any disinterested person that there was no ambiguity as to the answer to the inquiry about fits,"—that it was clearly intended for the word "No," although indistinctly written.

This application was forwarded to the company, which executed the policy, and attached to the back thereof, with mucilage or some similar substance, a copy of the application, and forwarded the same to the insured, the original application being retained by the company. The instrument attached to the back of the policy was an exact copy of the original application, except that the categorical answers to the five questions referred to, including the sixteenth, were very clearly and distinctly written "No." The policy, with this copy of the application attached, was retained by the insured in his possession, without objection, so far as appears, until his death, over three years afterwards. About the last of April, 1896, the insured, while driving a team attached to a load of lumber along a country road, from some cause that can only be conjectured, fell off the wagon, and was run over by one of its wheels, and thereby received injuries from which he died almost immediately. His widow, as the beneficiary, brought this action on the policy.

One of the defenses interposed by the defendant was misrepresentation and concealment of the deceased in obtaining membership, and especially misrepresentation and falsehood in his answer to the sixteenth question in the application already referred to. The evidence is uncontradicted that the deceased was, at the time he made the application for insurance, and for some years before had been, and up to the time of his death continued to be, subject to quite severe epileptic

fits at longer or shorter intervals. Upon the foregoing state of the evidence, when plaintiff rested, the court, on motion of the defendant, dismissed the action.

The first and main contention of the plaintiff's counsel is that the application for membership was not "indorsed" upon the policy as therein provided, and therefore it is no part of it, and the defendant cannot claim by way of defense the benefit of anything contained in the application. His claim is that "attached" is not "indorsed"; that the latter word means written or printed upon the back of the same paper upon which are written or printed the terms of what is popularly called the "policy."

We cannot agree with counsel. The word "indorsed," as used in this policy, is not to be construed in the technical sense in which it is used in the law merchant as applied to bills of exchange or promissory notes, where it means written on the bill or note itself, but in the more primitive and popular sense of something written or printed upon or attached to a document, upon the opposite side of which something else had been previously written or printed. Where an application is made a part of the policy, provisions in the policy for incorporating the application into the policy or attaching it thereto, or statutes requiring this to be done, have for their object the protection of both the insurer and the insured against controversies growing out of alleged fraud or mistake in the statements made in the application. These applications are usually filled up by an agent of the insurer. Although correctly filled up according to the answers given by the applicant, yet, when a loss occurs, the insured or his beneficiaries may claim that correct answers were given, but not correctly inserted in the application.

On the other hand, although correct answers may have been given, they may have been, by mistake or fraud, incorrectly stated in the application, and after the death of the insured his beneficiaries may be confronted with it as a ground of avoiding the policy, when it is no longer possible to prove its inaccuracy. But if a copy of the application is in some way attached to or inserted in the policy delivered to the insured, he may always, by reference to it, fully ascertain its contents, and all the terms and conditions of his contract, and, if any of his alleged answers are incorrectly stated, he may repudiate them, and demand their correction. On the other hand, if he retains the policy without objection, he will be deemed to have approved of it, and accepted it as correctly stating his answers, so that neither he nor his beneficiaries can say that the answers were inserted incorrectly, and without his knowledge.

Hence the important and essential thing is not how, or in what particular manner, the application is attached to or contained in the policy, but that it shall be contained in or attached to it so as to furnish to the insured full knowledge of its contents by reference to the

policy and the documents physically connected with it. Therefore in statutes, as in Pennsylvania, Iowa, and Wisconsin, containing provisions having this same general object, we find the expressions, "contain copies," "attach to such policy or indorse thereon," and the like, used indiscriminately, indicating that the particular manner of attaching the application to the policy was deemed unimportant so long as it was in fact attached to, indorsed upon, or contained in it. We are therefore of opinion that attaching the copy of the application to the back of the policy was a substantial compliance with the provisions of the policy, so as to make the former a part of the latter. * * * Affirmed.

VI. Same—Mutual Benefit Insurance¹⁸

SUPREME LODGE OF SONS & DAUGHTERS OF PROTECTION v. UNDERWOOD.

(Supreme Court of Nebraska, 1902. 3 Neb. [Unof.] 798, 92 N. W. 1051.)

Commissioners' opinion.

ALBERT, C.¹⁹ This action was brought by Emma E. Underwood to recover on a beneficiary certificate issued by the Supreme Lodge of the Sons and Daughters of Protection, a fraternal insurance company, organized for the benefit of its members and beneficiaries, insuring the life of her husband for her benefit. The petition is in the usual form, and sufficiently states a cause of action. * * * The defense relied on is that the assured committed suicide. The answer, among other things, contains the following allegations: "That at the time of issuing said certificate * * * it [the defendant] had in its possession the following agreement, made, executed, and delivered to it by the said David M. Underwood, which was in words and figures as follows, to wit." Then follows a copy of what purports to be an application of the assured for membership in the defendant order, containing, among other stipulations, the following: "I further agree that, should I commit suicide within two years from the date of my admission into the order, whether sane or insane at the time, that this contract shall be null and void, and of no binding force upon the said supreme lodge." Then follows the allegation that the defendant would not have issued said certificate "but for the agreement, representations, and statements

¹⁸ For discussion of principles, see Vance on Insurance, § 69. See, also, Cooley, Briefs on the Law of Insurance, vol. 1, p. 690 et seq.

¹⁹ Part of the opinion is omitted.

made by the said Daniel M. Underwood in his application for membership." The jury returned a verdict for the plaintiff, and judgment was given accordingly. The defendant brings error.

Every defense, save that of suicide, is eliminated from this case, and the reasons urged for a reversal of the judgment of the district court are based entirely in the evidence, rulings, and instructions of the court in regard to that defense. We do not deem it necessary to examine into those reasons, because we are satisfied that the question of suicide is immaterial, in view of the record. The certificate names the plaintiff as beneficiary. It contains no provision exempting the defendant from liability in case the assured dies by his own hand. Neither the constitution nor the by-laws of the defendant contains any such provision. It is true, what purports to be an application of the assured contains such a provision, but it is not referred to in the certificate, nor does it provide that it shall be a part of the contract; neither does the constitution or by-laws make it a part of the contract of insurance. There is no doubt it might be a part contract, in the absence of all these things; but in that event its relation to the contract should appear by apt averments. The answer contains no such averments. It does not even give the date of the alleged application, nor is there any allegation that the certificate is based on such application. These omissions are not cured by the appellation that the certificate would not have issued "but for the agreements, statements, and representations made by the said David M. Underwood in his application for membership," because such omissions destroy the force of this very allegation. In our opinion, therefore, the certificate, with the constitution and by-laws, constituted the contract of insurance; and as the contract, as thus constituted, contains no provision against suicide, a defense based on such ground is not available in this case on the facts stated. *Mills v. Rebstock*, 29 Minn. 380, 13 N. W. 162; *Kerr v. Association*, 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631; *Patterson v. Insurance Co.*, 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899; *Fitch v. Insurance Co.*, 59 N. Y. 557, 17 Am. Rep. 372; *Goodwin v. Association*, 97 Iowa, 226, 66 N. W. 157, 32 L. R. A. 476, 59 Am. St. Rep. 411.

In this view of the case the record shows no defense to the action, and the errors relied upon, should they be held errors, are without prejudice to the defendant.

It is recommended that the judgment of the district court be affirmed.

PER CURIAM. The conclusions reached by the commissioners are approved, and, it appearing that the adoption of the recommendations made will result in a right decision of the cause, it is ordered that the judgment of the district court be affirmed.

REYNOLDS v. SUPREME COUNCIL OF ROYAL ARCANUM.

(Supreme Judicial Court of Massachusetts, 1906. 192 Mass. 150, 78 N. E. 129, 7 L. R. A. [N. S.] 1154, 7 Ann. Cas. 776.)

Case reserved for full court.

KNOWLTON, C. J.²⁰ This is a bill in equity to set aside certain changes in the defendant's by-laws which affect the rights of certificate holders. The defendant is a fraternal beneficiary association, organized under the laws of Massachusetts in 1877, and now subject to the provisions of Rev. Laws, c. 119, and the acts in amendment thereof. The plaintiffs are certificate holders, who bring this bill for themselves and in behalf of others.

From the time of its organization the defendant issued certificates to members, agreeing to pay to a designated beneficiary a sum not exceeding a certain number of dollars on the death of the member, upon compliance by him with certain conditions therein stated. The by-laws provided that the death benefit should be for a definite amount, and payments of these definite amounts have always been made. The words "not exceeding" are inserted in the certificate to meet the possibility of a single full assessment not being equal to the amount stated. This limitation of the payment to the amount of an assessment, except when there is an emergency fund, was expressly called for by St. 1899, p. 471, c. 442, § 11, which is now found in Rev. Laws, c. 119, § 6.

Until 1898 the assessments paid by members, from which the death benefits were derived, were certain sums dependent upon the age of the member at the time of receiving his certificate, which sums remained the same as the years went by. These sums were paid to meet assessments as members died, and the amount for the first year would equal the cost to the corporation of the insurance of these members. But as the members grew older the risk of their death increased, and as their payments remained constant, and as there was at no time a payment of any surplus beyond the amount required to meet losses, the payments by members of long standing were not nearly enough to equal the cost of their insurance to the corporation. So the only way in which the amounts required to meet losses could be obtained was from the payments made by new members.

In 1898 the by-laws were amended so as largely to increase the payments to be made by all members, and to require the payments monthly. These amendments went into effect on August 1, 1898, and it appears by the agreed facts that no objection thereto has ever been made by any member of the order. These payments, while much larger than those required by the original by-laws, were upon the same relative basis; that is, the increase upon all was in the same propor-

²⁰ Part of the opinion is omitted.

tion, and they were all determined by the age of the member when he received his certificate, and were not to be afterwards changed as a member grew older.

When these amendments were made it was thought that the increase would provide for the future payments called for by the certificates, and that an adequate emergency fund would be created from this income. Under these amendments there was a surplus in 1898 from the excess of receipts above payments amounting to more than \$455,000, and afterwards there was annually a steadily diminishing surplus from the same cause to and including the year 1903. In the year 1904 the payments exceeded the receipts, and there was a deficit of \$270,540.50.

Prior to the session of the Supreme Council in May, 1905, the executive committee caused mortality tables of the order to be prepared, and made extended investigations and studies with the aid of competent actuaries, to devise some method, through a change of by-laws, which should enable the corporation to meet its obligations to members. The actuaries prepared for them new tables, each the mathematical equivalent of the others, the first being the regular rates, and three others optional alternatives. These were founded upon the payment by the order of the maximum value of each certificate, and the payment by the member of a rate adequate, without further modification or additional assessment, to pay the certificate at the maturity thereof. It is agreed that "competent actuaries would testify, and the case may be taken as though they had testified, that the old plan of assessments was faulty, according to the assumptions made by the actuaries, and that the order could not meet the maximum face of its certificates under it; that upon their assumptions a change was expedient or necessary; that the plans proposed and adopted were mathematically correct; that if the members paid the amounts fixed in these tables the order could continue to pay the maximum face value of its certificates at their maturity; that such amounts are no higher than necessary for this purpose, and that they fairly and equitably apportion among the members their contributions to the widows' and orphans' benefit fund, taking into consideration their age and risk." "The plaintiffs do not controvert this evidence in this case, but reserve the right to discuss its materiality, the basis and theories upon which it rests, and its application to this case." On January 1, 1905, the members of the corporation were 305,083 in number, and they held benefit certificates amounting to \$680,848,000.

Under these conditions the changes recommended by the actuaries were adopted by an amendment of the by-laws by an almost unanimous vote of the members of the Supreme Council, and the question is whether the changes are legal and binding upon the members.

From the facts agreed it is plain that a great corporation, managing and controlling important financial interests for hundreds of thousands of families, was conducting its business upon unsound princi-

ples, which, if followed without change, would ultimately lead to financial ruin. The first question is, was the change adopted in excess of the defendant's corporate powers, or in violation of the statute governing such corporations? The statutes authorize the adoption of by-laws declaring "the manner in which * * * the purposes of its incorporation may be accomplished." Rev. Laws, c. 125, § 6; Id., c. 119, § 2. These by-laws may prescribe the "assessments and benefits in case of disability or death, and the conditions upon which the same shall be paid, * * * the method of the amendment of the by-laws, and such other provisions as the corporation may determine." Rev. Laws, c. 119, § 2. Such a corporation "may make provisions for the payment of benefits in case of death or disability or both. The funds from which the payment of such benefits shall be made shall be derived only from assessments collected from the members. * * * Such provisions, funds, assessments, and payments shall be as required in the by-laws of the corporation." Rev. Laws, c. 119, § 6.

Plainly the statute contemplates that such corporations shall have power to establish by their by-laws a system of giving death benefits which shall be sound and equitable, and founded on principles which can reasonably be expected to furnish proper security for the performance of their contracts with members. The power to make proper changes in these particulars by amendment of the by-laws from time to time is expressly given.

There is no ground for the contention that it is a violation of the statute or of the defendant's chartered rights to provide for such assessments as will be likely to insure the payment of the sums named in the certificates. The statute expressly authorizes, not only a death fund amounting to three full assessments upon the members, but also the accumulation of an emergency fund amounting to 5 per cent. upon the face value of all outstanding benefit certificates. The emergency fund is to be invested in safe securities, and all of these are to be deposited with the treasurer of the commonwealth. Rev. Laws, c. 119, § 7. As the promise to pay the beneficiary is binding upon the corporation, it ought to make adequate provision to obtain the means of payment. *Newhall v. American Legion of Honor*, 181 Mass. 111, 63 N. E. 1.

The objection that the amendments are illegal by reason of the division of the members into classes cannot prevail. There is no objection to a classification of members according to age, and it would be unjust to disregard age in determining the rates that different persons shall pay for death benefits in an association of this kind.

The distinctive features of such organizations remain since the adoption of the amendments as well as before. The fraternal plan, with mutuality and without profit, distinguishes the work of such an association from a commercial enterprise. It is a charitable and benevolent organization, with a limitation of membership to a special class, and a limitation upon the choice of beneficiaries. It is not al-

lowed to employ paid agents in soliciting or procuring business, except within very narrow limits prescribed by the statutes. Rev. Laws, c. 119, § 16. Looking to the nature and purposes of fraternal beneficiary corporations, we see nothing in the amendments at variance with the laws. It cannot have been intended that such corporations should be limited to a method of assessment that would be sure to bring about their early dissolution.

Another question is whether the amendments are in violation of the contract rights of members. It is stated in the record that "the agreements between the plaintiff and the defendant concerning assessments and benefits are not contained in any one specific instrument, but are found in the application for membership, the benefit certificate, the laws of Massachusetts constituting the charter and the constitution and laws of the order." If there were no express stipulation in regard to the by-laws in the application for membership or in the certificates, all members of such a corporation would be bound by by-laws regularly made or amended. *Durfee v. Old Colony, etc., R. R. Co.*, 5 Allen, 230, 242; *Pain v. Société St. Jean Baptiste*, 172 Mass. 319, 52 N. E. 502, 70 Am. St. Rep. 287; *Oliver v. Hopkins*, 144 Mass. 175, 10 N. E. 776; *Spilman v. Supreme Council Home Circle*, 157 Mass. 128, 31 N. E. 776; *Wright v. Minn. Mutual Life Ins. Co.*, 193 U. S. 657, 24 Sup. Ct. 549, 48 L. Ed. 832; *Supreme Lodge Knights of Pythias v. Knight*, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409.

Every member of this corporation, at the time of joining it, enters into an express agreement to "conform to and abide by the constitution, laws, rules and usages of the said council and order, now in force or which may hereafter be adopted by the same." The certificates promise payment only on condition that the member complies "with the laws, rules and regulations now governing the said council and fund, or that may hereafter be enacted by the Supreme Council to govern the said council and fund," etc. Here in the contract is full authority to amend the laws, rules and regulations. * * *

This part of the present case is covered in principle by the decisions of this court in *Messer v. Grand Lodge*, 180 Mass. 321, 62 N. E. 252, and *Pain v. Société St. Jean Baptiste*, 172 Mass. 319, 52 N. E. 502, 70 Am. St. Rep. 287, in which cases changes similar to those made by the defendant were upheld under like contracts. The same general doctrine has been stated in many cases in other courts. *Wright v. Minn. Mutual Life Ins. Co.*, 193 U. S. 657, 24 Sup. Ct. 549, 48 L. Ed. 832; *Fullenwider v. Supreme Council Royal League*, 73 Ill. App. 321; s. c., 180 Ill. 621, 54 N. E. 485, 72 Am. St. Rep. 239; *Bartram v. Supreme Council Royal Arcanum*, 6 Ont. W. R. 404; *Gaines v. Supreme Council Royal Arcanum (C. C.)* 140 Fed. 978; *Fugure v. Society St. Joseph*, 46 Vt. 362; *Supreme Lodge Knights of Pythias v. Knight*, 117 Ind. 489, 20 N. E. 479, 3 L. R. A. 409; *Haydel v. Mutual Reserve Fund Life Ass'n*, 104 Fed. 718, 44 C. C. A. 169; *Gaut v. Same*

(C. C.) 121 Fed. 403, 409; *Richmond v. Supreme Lodge Order of Protection*, 100 Mo. App. 8, 71 S. W. 736; *Barbot v. Mutual Reserve Fund Life Ass'n*, 100 Ga. 681, 28 S. E. 498; *Mutual Reserve Fund Life Ass'n v. Taylor*, 99 Va. 208, 37 S. E. 854.

There are many cases in which it is held that the amount expressly promised to be paid in a certificate like those issued by the defendant cannot be cut down by an amendment of the by-laws. *Newhall v. American Legion of Honor*, 181 Mass. 111, 63 N. E. 1; *Langan v. Same*, 174 N. Y. 266, 66 N. E. 932; *American Legion of Honor v. Getz*, 112 Fed. 119, 50 C. C. A. 153. But in many of these, as in the case from this court last cited, a distinction is made between the express stipulation of the corporation to pay a certain sum and other provisions relating to the methods of the corporation, and the duties of the certificate holders, which properly may be a subject for regulation by by-laws, even though they affect the rights of the parties under their contract. The assessments to be paid for death benefits in this case are provided for by the by-laws, while the promise in writing to pay a certain sum to a particular person is, as to that person, a matter outside of those corporate rules which may be expected to be changed by an amendment of the by-laws. This promise on one side is set over against the promise of the member on the other. The promise of the member is to do what may be called for by the by-laws then existing or that may afterwards be adopted. The promise of the corporation is stated expressly, without mention of the by-laws. The member occupies a dual position, as an insurer and the insured. As one of the association agreeing to provide for the payments that may become due to members, he agrees to be subject to the by-laws. As the insured person to whom a particular sum of money is promised, he has a right to stand on the terms of the promise.

That the duties of members prescribed by the by-laws remain subject to modification when a power of amendment is reserved has often been decided. *Loeffler v. Modern Woodmen of America*, 100 Wis. 79, 75 N. W. 1012; *Langnecker v. Grand Lodge A. O. U. W.*, 111 Wis. 279, 87 N. W. 293, 55 L. R. A. 185, 87 Am. St. Rep. 860; *Lawson v. Hewell*, 118 Cal. 613, 50 Pac. 763, 49 L. R. A. 400; *Gilmore v. Knights of Columbus*, 77 Conn. 58, 58 Atl. 223, 107 Am. St. Rep. 17, 1 Ann. Cas. 715; *Ellerbe v. Faust*, 119 Mo. 653, 25 S. W. 390, 25 L. R. A. 149.

Most of the cases relied on by the plaintiffs, when rightly analyzed, turn on the distinction between an attempted amendment of the by-laws directly affecting the promise to the certificate holder as an insured person, and an amendment affecting his duties as a member of the corporation bound to perform his part in providing means or otherwise as one of the association of insurers. *Hale v. Equitable Aid Union*, 168 Pa. 377, 31 Atl. 1066; *Fargo v. Supreme Tent*, 96 App. Div. 491, 89 N. Y. Supp. 65; *Weber v. Supreme Tent*, 172 N. Y. 490, 65 N. E. 258, 92 Am. St. Rep. 753; *Sautter v. Supreme Con-*

clave, 72 N. J. Law, 325, 62 Atl. 529; Tebo v. Royal Arcanum, 89 Minn. 3, 93 N. W. 513; Deuble v. Grand Lodge, 66 App. Div. 323, 72 N. Y. Supp. 755; Deuble v. Grand Lodge, 172 N. Y. 665, 65 N. E. 1116; Beach v. Supreme Tent, 177 N. Y. 100, 69 N. E. 281; Startling v. Royal Templars, 108 Mich. 440, 66 N. W. 340, 62 Am. St. Rep. 709; Peterson v. Gibson, 191 Ill. 365, 61 N. E. 127, 54 L. R. A. 836, 85 Am. St. Rep. 263; Wist v. Grand Lodge, 22 Or. 271, 29 Pac. 610, 29 Am. St. Rep. 603; Roberts v. Cohen, 60 App. Div. 259, 70 N. Y. Supp. 57; Roberts v. Grand Lodge, 173 N. Y. 580, 65 N. E. 1122; United Workmen v. Stumpf, 24 Tex. Civ. App. 309, 58 S. W. 840; Hadley v. Woodman, 1 Tenn. Ch. App. 413; Spencer v. Grand Lodge, 53 App. Div. 627, 65 N. Y. Supp. 1146. Other cases cited by the plaintiffs are clearly adverse to the view which we take. See Ebert v. Mutual Ass'n, 81 Minn. 116, 83 N. W. 506, 834, 84 N. W. 457; Strauss v. Mut. Ass'n, 126 N. C. 971, 36 S. E. 352, 54 L. R. A. 605, 83 Am. St. Rep. 699; Benjamin v. Mutual, 146 Cal. 34, 79 Pac. 517.

On principle and on the weight of authority we are of opinion that there is nothing in this contract that prevents the corporation from amending its by-laws in a reasonable way, to accomplish the purposes for which it was organized, even though the change increases the payments to be made by certificate holders. Such changes necessarily involve some hardship to certain individual members, but the corporation, under the law, should do that which will bring the greatest good to the greatest number. The members who complain of its action are those who have had the benefit of insurance for themselves and their families for many years, at very much less than the cost of their insurance to the corporation. They have had the good fortune to survive, and therefore their contracts have brought them no money, but all the time they have had the stipulated security against the risk of death. If now they are called upon to pay for future insurance no more than its cost to the corporation they ought not to think it unjust. Bill dismissed.²¹

²¹ For a full discussion of the question as to the extent to which members of a mutual benefit association are bound by subsequent by-laws, see Cooley, Briefs on the Law of Insurance, vol. 1, pp. 703-720. ,

THE CONSIDERATION—PREMIUMS AND ASSESSMENTS

I. In General—Nature of the Obligation ¹

FULLER v. METROPOLITAN LIFE INS. CO.

(Supreme Court of Errors of Connecticut, 1898. 70 Conn. 647, 41 Atl. 4.)

HAMERSLEY, J.² * * * Life insurance is protection given to one person against the damage he may suffer through the death of another. A mere wager on the accident of death is void. In mutual life insurance the protection is furnished by the premiums paid by policy holders. The duration of any particular life is the merest chance, but the average duration of life from any particular age approaches mathematical certainty. Hence it is possible to calculate the sum which, paid annually by a large number of insured, will satisfy the insurance on those who may die each year. It is the yearly death claims which constitute the cost of insurance that the premiums must pay. This cost for a young man is small, but increases each year, until it becomes very large. To avoid the necessity of an increasing premium, a uniform premium is calculated, which furnishes at first much more than enough to pay the cost of insurance, and later on is entirely insufficient for that purpose. So the portion of the premium not used for the early yearly cost is reserved for use when the premium will become insufficient, and is invested, so that it may increase at compound interest. It follows that the portion of the premiums applied to pay the yearly cost gradually increases, and that the portion which has been reserved to make up the insufficiency of the premium to pay future cost increases with the aid of interest. The part of the premium intended to meet the cost of insurance, both current and future, is called the "net premium." It is the sum paid yearly by each to furnish the stipulated protection for all. But the policy holders must pay not only for the cost of insurance, but also for the expense of management; so to the net premium is added a sum deemed sufficient to pay expenses and provide for contingencies, which is called the "loading." In this way the policy holders pay the sum necessary for the cost of insurance and expense of management.

The amount of the net premium is calculated upon the basis of certain tables of mortality, and upon the assumption that the company will receive a certain rate of interest upon all its assets, and the

¹ For discussion of principles, see Vance on Insurance, §§ 70, 71. See, also, Cooley, Briefs on the Law of Insurance, vol. 1, pp. 98-105, vol. 2, pp. 910-1037.

² The statement of facts and part of the opinion are omitted.

amount of the loading is calculated upon a certain assumed rate of expense. Now, it may happen that the rate of mortality experienced by the company is less, and the rate of interest actually received is greater, than that assumed, and that the ratio of actual expense is less. In such case the company has in reserve more than enough, with the anticipated annual premiums, to provide for future cost of insurance and management. It has a sum which is not needed for the purpose for which it was paid. This sum is called "profits." It is in fact a surplus resulting from overpayments by policy holders. This surplus is derived from money paid by the insured and received by the company for a particular purpose, i. e. providing for cost of insurance and expense of management. If not needed for that purpose, it should, in equity, be returned to the policy holders. They do not, however, own it, or have any legal control over its distribution. Part of it, indeed, is derived from contributions of policy holders who are dead; but the equity is recognized, and it is the duty of the company, when a surplus is ascertained, to return such portion as it does not deem proper to keep as a guaranty fund to the existing policy holders in equitable (i. e. as nearly as practicable) proportion to their overpayments or contributions. Such return of overpayments, whether in cash or by application on future premiums, or by increase of the amount insured, is a dividend. This is the meaning of "dividend," and the only meaning it has or can have in connection with mutual insurance.

The surplus may also be increased through the failure of some to continue their policies. Where a policy thus lapses, the company has in hand the accumulations of a portion of its premiums, invested and held in reserve to supply the insufficiency of future premiums to pay future cost of insurance. (The amount thus held in reserve depends on the judgment of the company in calculating its premiums and the condition of its business, but the statute treats the company as legally insolvent unless its whole reserve is at least equal in amount to the reserve value of all the policies, calculated according to a rule established by law. Some companies accumulate a reserve larger than that required by statute. None can have less and remain solvent.) By a lapse the company loses the future premiums, and may lose in other ways; but it is relieved from providing for future cost of insurance as to that policy, and ordinarily, when the reserve fund is good, there is a considerable gain, which may increase the surplus.

Formerly, whatever gain there was went to increase the surplus; but latterly, in view of the fact that these overpayments are made to provide for future cost of insurance by a policy holder who up to the time of lapse has theoretically paid his full share of the yearly cost and expense, the equity of the lapsed policy holder has prevailed over the equity of those who remain, and he is allowed an equitable portion of those overpayments, and this is called the "surrender value" of his policy. When a policy lapses, the portions of prior premiums

invested and held in reserve can no longer be applied to the purpose for which they were made, and to the extent of the net gain by the lapse become overpayments, and in equity should be returned to the holder of the lapsed policy, or to the surplus, for the benefit of all. A dividend, therefore, is a distribution of existing overpayments, resulting mainly from savings on the annual cost of insurance and expense of management, and in part from savings on the future cost of insurance, i. e. the net gain from lapsed policies. * * *

NEW YORK LIFE INS. CO. v. STATHAM.

(Supreme Court of United States, 1876. 93 U. S. 24, 23 L. Ed. 789.)

Bill in equity to recover amount of a policy of life insurance on the life of A. D. Statham, a resident of Mississippi at the time of his death. It appeared that premiums on the policy were paid until the breaking out of the Civil War. Because of that the premium due December 8, 1861, was not paid. Insured died in July, 1862. Heard with the appeal in the equity case were writs of error in two actions at law, involving similar facts. Each of the policies involved provided for forfeiture of the policy for non-payment of premiums when due, and such non-payment was pleaded in defense. The plaintiffs contended that non-payment was excused by the existence of war. The decree and judgments below were for the plaintiffs.

Mr. Justice BRADLEY, after stating the case, delivered the opinion of the court.³

We agree with the court below, that the contract is not an assurance for a single year, with a privilege of renewal from year to year by paying the annual premium, but that it is an entire contract of assurance for life, subject to discontinuance and forfeiture for non-payment of any of the stipulated premiums. Such is the form of the contract, and such is its character. It has been contended that the payment of each premium is the consideration for insurance during the next following year,—as in fire policies. But the position is untenable. It often happens that the assured pays the entire premium in advance, or in five, ten, or twenty annual instalments. Such instalments are clearly not intended as the consideration for the respective years in which they are paid; for, after they are all paid, the policy stands good for the balance of the life insured, without any further payment. Each instalment is, in fact, part consideration of the entire insurance for life. It is the same thing, where the annual premiums are spread over the whole life. The value of assurance for one year of a man's life when he is young, strong, and healthy, is manifestly not the same as when he is old and decrepit. There is no proper re-

³ The statement of facts is rewritten.

lation between the annual premium and the risk of assurance for the year in which it is paid. This idea of assurance from year to year is the suggestion of ingenious counsel. The annual premiums are an annuity, the present value of which is calculated to correspond with the present value of the amount assured, a reasonable percentage being added to the premiums to cover expenses and contingencies. The whole premiums are balanced against the whole insurance.

But whilst this is true, it must be conceded that promptness of payment is essential in the business of life insurance. All the calculations of the insurance company are based on the hypothesis of prompt payments. They not only calculate on the receipt of the premiums when due, but on compounding interest upon them. It is on this basis that they are enabled to offer assurance at the favorable rates they do. Forfeiture for non-payment is a necessary means of protecting themselves from embarrassment. Unless it were enforceable, the business would be thrown into utter confusion. It is like the forfeiture of shares in mining enterprises, and all other hazardous undertakings. There must be power to cut off unprofitable members, or the success of the whole scheme is endangered. The insured parties are associates in a great scheme. This associated relation exists whether the company be a mutual one or not. Each is interested in the engagements of all; for out of the coexistence of many risks arises the law of average, which underlies the whole business. An essential feature of this scheme is the mathematical calculations referred to, on which the premiums and amounts assured are based. And these calculations, again, are based on the assumption of average mortality, and of prompt payments and compound interest thereon. Delinquency cannot be tolerated nor redeemed, except at the option of the company. This has always been the understanding and the practice in this department of business. Some companies, it is true, accord a grace of thirty days, or other fixed period, within which the premium in arrear may be paid, on certain conditions of continued good health, &c. But this is a matter of stipulation, or of discretion, on the part of the particular company. When no stipulation exists, it is the general understanding that time is material, and that the forfeiture is absolute if the premium be not paid. The extraordinary and even desperate efforts sometimes made, when an insured person is in extremis, to meet a premium coming due, demonstrates the common view of this matter.

The case, therefore, is one in which time is material and of the essence of the contract. Non-payment at the day involves absolute forfeiture, if such be the terms of the contract, as is the case here. Courts cannot with safety vary the stipulation of the parties by introducing equities for the relief of the insured against their own negligence.

But the court below bases its decision on the assumption that, when performance of the condition becomes illegal in consequence

of the prevalence of public war, it is excused, and forfeiture does not ensue. It supposes the contract to have been suspended during the war, and to have revived with all its force when the war ended. Such a suspension and revival do take place in the case of ordinary debts. But have they ever been known to take place in the case of executory contracts in which time is material? If a Texas merchant had contracted to furnish some Northern explorer a thousand cans of preserved meat by a certain day, so as to be ready for his departure for the North Pole, and was prevented from furnishing it by the civil war, would the contract still be good at the close of the war five years afterwards, and after the return of the expedition? If the proprietor of a Tennessee quarry had agreed, in 1860, to furnish, during the two following years, ten thousand cubic feet of marble, for the construction of a building in Cincinnati, could he have claimed to perform the contract in 1865, on the ground that the war prevented an earlier performance?

The truth is, that the doctrine of the revival of contracts suspended during the war is one based on considerations of equity and justice, and cannot be invoked to revive a contract which it would be unjust or inequitable to revive.

In the case of life insurance, besides the materiality of time in the performance of the contract, another strong reason exists why the policy should not be revived. The parties do not stand on equal ground in reference to such a revival. It would operate most unjustly against the company. The business of insurance is founded on the law of averages; that of life insurance eminently so. The average rate of mortality is the basis on which it rests. By spreading their risks over a large number of cases, the companies calculate on this average with reasonable certainty and safety. Any thing that interferes with it deranges the security of the business. If every policy lapsed by reason of the war should be revived, and all the back premiums should be paid, the companies would have the benefit of this average amount of risk. But the good risks are never heard from; only the bad are sought to be revived, where the person insured is either dead or dying. Those in health can get new policies cheaper than to pay arrearages on the old. To enforce a revival of the bad cases, whilst the company necessarily lose the cases which are desirable, would be manifestly unjust. An insured person, as before stated, does not stand isolated and alone. His case is connected with and co-related to the cases of all others insured by the same company. The nature of the business, as a whole, must be looked at to understand the general equities of the parties.

We are of opinion, therefore, that an action cannot be maintained for the amount assured on a policy of life insurance forfeited, like those in question, by non-payment of the premium, even though the payment was prevented by the existence of the war.

The question then arises, Must the insured lose all the money

which has been paid for premiums on their respective policies? If they must, they will sustain an equal injustice to that which the companies would sustain by reviving the policies. At the very first blush, it seems manifest that justice requires that they should have some compensation or return for the money already paid, otherwise the companies would be the gainers from their loss; and that from a cause for which neither party is to blame. The case may be illustrated thus: Suppose an inhabitant of Georgia had bargained for a house, situated in a Northern city, to be paid for by instalments, and no title to be made until all the instalments were paid, with a condition that, on the failure to pay any of the instalments when due, the contract should be at an end, and the previous payments forfeited; and suppose that this condition was declared by the parties to be absolute and the time of payment material. Now, if some of the instalments were paid before the war, and others accruing during the war were not paid, the contract, as an executory one, was at an end. If the necessities of the vendor obliged him to avail himself of the condition, and to resell the property to another party, would it be just for him to retain the money he had received? Perhaps it might be just if the failure to pay had been voluntary, or could, by possibility, have been avoided. But it was caused by an event beyond the control of either party,—an event which made it unlawful to pay. In such case, whilst it would be unjust, after the war, to enforce the contract as an executory one against the vendor, contrary to his will, it would be equally unjust in him, treating it as ended, to insist upon the forfeiture of the money already paid on it. An equitable right to some compensation or return for previous payments would clearly result from the circumstances of the case. The money paid by the purchaser, subject to the value of any possession which he may have enjoyed, should, *ex æquo et bono*, be returned to him. This would clearly be demanded by justice and right.

And so, in the present case, whilst the insurance company has a right to insist on the materiality of time in the condition of payment of premiums, and to hold the contract ended by reason of non-payment, they cannot with any fairness insist upon the condition, as it regards the forfeiture of the premiums already paid; that would be clearly unjust and inequitable. The insured has an equitable right to have this amount restored to him, subject to a deduction for the value of the assurance enjoyed by him whilst the policy was in existence; in other words, he is fairly entitled to have the equitable value of his policy.

As before suggested, the annual premiums are not the consideration of assurance for the year in which they are severally paid, for they are equal in amount; whereas, the risk in the early years of life is much less than in the later. It is common knowledge, that the annual premiums are increased with the age of the person ap-

plying for insurance. According to approved tables, a person becoming insured at twenty-five is charged about twenty dollars annual premium on a policy of one thousand dollars, whilst a person at forty-five is charged about thirty-eight dollars. It is evident, therefore, that, when the younger person arrives at forty-five, his policy has become, by reason of his previous payments, of considerable value. Instead of having to pay, for the balance of his life, thirty-eight dollars per annum, as he would if he took out a new policy on which nothing had been paid, he has only to pay twenty dollars. The difference (eighteen dollars per annum during his life) is called the equitable value of his policy. The present value of the assurance on his life exceeds by this amount what he has yet to pay. Indeed, the company, if well managed, has laid aside and invested a reserve fund equal to this equitable value, to be appropriated to the payment of his policy when it falls due. This reserve fund has grown out of the premiums already paid. It belongs, in one sense, to the insured who has paid them, somewhat as a deposit in a savings-bank is said to belong to the person who made the deposit. Indeed, some life-insurance companies have a standing regulation by which they agree to pay to any person insured the equitable value of his policy whenever he wishes it; in other words, it is due on demand. But whether thus demandable or not, the policy has a real value corresponding to it,—a value on which the holder often realizes money by borrowing. The careful capitalist does not fail to see that the present value of the amount assured exceeds the present value of the annuity or annual premium yet to be paid by the assured party. The present value of the amount assured is exactly represented by the annuity which would have to be paid on a new policy; or, thirty-eight dollars per annum in the case supposed, where the party is forty-five years old; whilst the present value of the premiums yet to be paid on a policy taken by the same person at twenty-five is but little more than half that amount. To forfeit this excess, which fairly belongs to the assured, and is fairly due from the company, and which the latter actually has in its coffers, and to do this for a cause beyond individual control, would be rank injustice. It would be taking away from the assured that which had already become substantially his property. It would be contrary to the maxim, that no one should be made rich by making another poor.

We are of opinion, therefore, first, that as the companies elected to insist upon the condition in these cases, the policies in question must be regarded as extinguished by the non-payment of the premiums, though caused by the existence of the war, and that an action will not lie for the amount insured thereon.

Secondly, that such failure being caused by a public war, without the fault of the assured, they are entitled *ex æquo et bono* to recover

the equitable value of the policies with interest from the close of the war.

It results from these conclusions that the several judgments and the decree in the cases before us, being in favor of the plaintiffs for the whole sum assured, must be reversed, and the records remanded for further proceedings. We perceive that the declarations in the actions at law contain no common or other counts applicable to the kind of relief which, according to our decision, the plaintiffs are entitled to demand; but as the question is one of first impression, in which the parties were necessarily somewhat in the dark with regard to their precise rights and remedies, we think it fair and just that they should be allowed to amend their pleadings. In the equitable suit, perhaps, the prayer for alternative relief might be sufficient to sustain a proper decree; but, nevertheless, the complainants should be allowed to amend their bill, if they shall be so advised.

In estimating the equitable value of a policy, no deduction should be made from the precise amount which the calculations give, as is sometimes done where policies are voluntarily surrendered, for the purpose of discouraging such surrenders; and the value should be taken as of the day when the first default occurred in the payment of the premium by which the policy became forfeited. In each case the rates of mortality and interest used in the tables of the company will form the basis of the calculation.

The decree in the equity suit and the judgments in the actions at law are reversed, and the causes respectively remanded to be proceeded with according to law and the directions of this opinion.

II. When the Premium is a Debt ⁴

CLARK v. SCHROMYER.

(Appellate Court of Indiana, 1899. 23 Ind. App. 565, 55 N. E. 785.)

Action by James H. Clark, receiver of the Masonic Benevolent Association of Central Illinois, against Frederick W. Schromyer. From a judgment for defendant, plaintiff appeals.

HENLEY, J. This action was by the receiver of the Masonic Benevolent Association of Central Illinois, a foreign corporation, to collect assessments which were alleged to have accrued prior to the dissolution of the association, and before the receiver was appointed. The complaint was in two paragraphs. Appellee demurred to

⁴ For discussion of principles, see Vance on Insurance, §§ 72, 73. See, also, Cooley, Briefs on the Law of Insurance, vol. 1, p. 82.

each paragraph of complaint. Appellee answered in two paragraphs, the first of which was a general denial. Appellant's demurrer to the second paragraph of answer was overruled. A reply of general denial put the cause at issue. There was a trial by the court, resulting in a general finding for appellee. Appellant's motion for a new trial was overruled, and judgment rendered in appellee's favor. Appellant assigns as error the action of the lower court in overruling the demurrer to the second paragraph of answer and in overruling the motion for a new trial. Appellee has assigned cross errors separately questioning the action of the lower court in overruling his demurrer to each paragraph of the complaint.

We will dispose first of the questions arising upon the assignment of cross errors, because, if the complaint was bad, and the appellee's demurrer ought to have been sustained to it, it is not material whether or not subsequent errors intervened. In such a case the judgment of the lower court will be affirmed, because a right conclusion has been reached. *Ice v. Ball*, 102 Ind. 42, 1 N. E. 66; *Palmer v. Railroad Co.*, 108 Ind. 137, 8 N. E. 905; *Manufacturing Co. v. Booth*, 10 Ind. App. 364, 37 N. E. 818; *Butler v. Railroad Co.*, 18 Ind. App. 656, 46 N. E. 92.

The only questions presented by the demurrer to the complaint are these: Can the receiver of an assessment insurance company collect an assessment from one who has accepted a policy, but has ceased paying thereon? Is the contract unilateral, and is the only penalty which follows a refusal to pay the loss of the policy holder's rights thereunder? These are new questions in this state. Life insurance contracts have been universally held to be unilateral, unless, by their express terms, made otherwise. The certificates issued by the association for which appellant was the receiver were beneficiary certificates, payable upon the death of the holders. They were, in their nature, policies of insurance. The company so issuing them was substantially a life insurance company. In *May*, Ins. § 550, it is said: "There are certain organizations prevalent in this country and elsewhere under the name of relief, benefit, or benevolent societies, or some similar name, which generally have for their object aid to their members, or their widows and children after the decease of their respective members. These associations, though not speculative, and not based upon capital paid in as an investment, have nevertheless a general purpose of mutual protection. * * * These certificates often resemble, both in form and substance, ordinary policies of life insurance; and the courts have with great uniformity treated them as substantially life insurance companies, applying to them and to the relatives of the members the rules and principles applicable to the contract of life insurance." See, also, *Association v. Robinson*, 147 Ill. 138, 35 N. E. 168; *Rockhold v. Society*, 129 Ill. 440, 21 N. E. 794, 2 L. R. A. 420; *Com. v. Wetherbee*, 105 Mass. 161.

The case of *Lehman v. Clark*, 174 Ill. 279, 51 N. E. 222, 43 L. R. A. 648, was in all respects like the case at bar. Appellee in that case was the same person as the appellant in the case at bar. Precisely the same questions were before the supreme court of Illinois as are here presented. It was there held that the certificate or policy of insurance such as was issued to the appellee in this cause was a unilateral contract. The case of *Lehman v. Clark*, supra, was decided June 23, 1898, which was after the trial and judgment in the case at bar. The supreme court of Illinois, in construing this contract of insurance, say: "Such contracts have heretofore always been considered unilateral, and so the whole plan of withdrawing is embraced in these self-executing clauses of the by-laws and contract. The member's failure to pay is his declaration of severance, and the forfeiture provided for in the by-laws and contract is the association's compensation. The option is with the member, and not with the association. When the appellant became a member he was required, among other things, to pay a sum into the mortuary surplus fund. The sum was two maximum assessments on his \$4,000 certificate. This money went directly into the fund for paying death losses; not a cent of it for dues or expenses. This more than paid the insurance from the date of his admission to the date of the maturity of his assessment for the first death benefit after he became a member. When he had paid his first assessment, that paid for his insurance to maturity of the second, and so on. The requirements for admission, not only in this association, but in all benefit associations or societies, more than cover the member's insurance from the date of his admission to the first assessment after he becomes a member. The statute under which the receiver was appointed contemplates that, if the court shall find that the association cannot longer continue in operation, and properly serve its purpose, then the court shall appoint a receiver, and wind up its affairs; or if the court shall find that it might longer continue in business, and properly serve its purpose, if the officers would do their duty in making assessments, then the court need not appoint a receiver, and wind up the concern, but may order an additional assessment to be made to meet deficiencies, and allow the concern to continue in operation. This shows that the legislature treated these contracts as unilateral. It did not contemplate the making of an assessment after the association had been found unable to longer properly serve its purpose. It is true that, a receiver having been appointed by the court, the court has power, independent of any statute, to direct him to collect assets, but that power does not change the character of the contract between the association and the member, and make the member a debtor, who, by his contract, is not so. When such association or society for any reason becomes unable longer to properly carry out its purpose, some must lose. All must lose except those who died and were paid before the as-

sociation became disabled. Those that have died and not been paid should have all that is left, and lose the balance; those that continue to live get nothing, and lose all. But it is said those that continue to live had their insurance all the time. They had just that kind of insurance that those that died had, and no better, and paid just as much for it. Those that have died get the surplus fund, and whatever else there is, and those that have lived get nothing. The mistakes or mismanagement which caused the ruin, if fault of the members at all, was as much the fault of the dead as the living, and was equally the misfortune of all."

We think the supreme court of Illinois arrived at the proper conclusion. Appellant correctly contends that the contract should be construed and governed by the charter and by-laws of the society and the statute of the domicile of the corporation. This being true, then the case last quoted from is decisive of the question in this case.

Appellant went to trial upon an insufficient complaint. The trial resulted in favor of appellee. There being no cause of action stated against appellee, the judgment of the lower court in his favor was correct, and the intervening errors, if any, will not be considered. Judgment affirmed.⁵

III. Payment of Premiums⁶

1. TO WHOM PAID

AMERICAN FIRE INS. CO. v. BROOKS.

(Court of Appeals of Maryland, 1896. 83 Md. 22, 34 Atl. 373.)

Action by Walter B. Brooks and another against the American Fire Insurance Company., Judgment for plaintiffs, and defendant appeals.

PAGE, J.⁷ This is an action on a policy of insurance issued by the appellant to Walter B. Brooks and W. H. Bosley, receivers of the Gay Manufacturing Company, upon a steam sawmill and machinery situated at Bosley, Gates county, N. C. * * * Policy No. 5,450, being that which forms the subject of this suit, was placed through the agency of George B. Coale & Son, brokers of Baltimore city, at the request of Mr. Bosley. Mr. Coale states in his

⁵ Compare *Lehman v. Clark*, 174 Ill. 279, 51 N. E. 222, 43 L. R. A. 648 (1898).

⁶ For discussion of principles, see *Vance on Insurance*, §§ 74, 75. See, also, *Cooley, Briefs on the Law of Insurance*, vol. 2, pp. 924, 996.

⁷ Part of the opinion is omitted.

testimony that the policy was forwarded to him by Mr. Kelley, the general agent of the company, and was delivered by himself to the receivers; that he collected the premium, and paid it to the company, less his commissions; and that he was never notified by it not to collect the premium. He further testified that he informed Mr. Kelley who Messrs. Brooks & Bosley were, and what business they were engaged in. The policy was dated the 21st August, 1891, and ran for one year from the 20th August.

On 1st August, 1892, a renewal receipt was sent by Mr. Kelley to Coale & Son. In his note transmitting it, Mr. Kelley states that he forwards to the Coales, "according to order received"; but there is no evidence that the plaintiffs gave such an order, or that it was given by the Coales, as a consequence of any conversation had with them or of any act for which they were responsible. Mr. Coale delivered the receipt to the receivers, and received from them a check for the premium; but, by reason of illness, he failed to remit the money to the company. On the 6th of October, the general agent of the company wrote to the Coales: "We seem to be without your remittance for August on policy No. 5,450, and will thank you for the same;" and again, on 3d November: "Premium of \$82.50 is still due on policy No. 5,450," etc.; "and, unless same is paid, we, of course, will consider our liability as having ceased, after receipt of this notice." * * * Not having received the premium from the Coales, on the 6th of December Mr. Kelley caused to be made on the books of his company certain entries, which, in that office, were understood to mean the policy was canceled, though that was not written in words. On the 3d of June the property was destroyed by fire. * * *

It appears to be well settled that, where one engages another to procure insurance, the person so employed is the agent of the insured, and not of the insurer, in all matters connected with such procurement. *Insurance Co. v. Reynolds*, 36 Mich. 502; *Oil Co. v. Triumph Ins. Co.*, 64 N. Y. 85. This rule applies to cases where the insurance has been effected through the medium of a broker, although the broker may have solicited the insured to take out the policy. Such solicitations only cannot constitute the broker the agent of the insurer, so as to bind the latter for the acts, declarations, or omissions of the former. 1 May, Ins. § 124a; *Insurance Co. v. Swigert*, 11 Ill. App. 590. But, when the broker's employment extends only to the procurement of the policy, his agency is not continuing. It ceases when the purpose of his employment has been accomplished; that is, upon the execution and delivery of the policy. *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932; *Hinkley v. Arey*, 27 Me. 364; *Lohnes v. Insurance Co.*, 121 Mass. 439; *Hermann v. Insurance Co.*, 100 N. Y. 411, 3 N. E. 341, 53 Am. Rep. 197.

If the broker undertake to do acts outside of such employment, the question for whom he acts will depend upon the special circumstances of the case; and, if the assured or insurer relies upon such acts to bind the other party, the burden of proof rests upon him who seeks to bind the other thereby, to prove his authority. In the absence of direct proof of actual authority, and where the effort is to bind the insurer, the insured may establish the agency by showing what acts the insurer has permitted the broker to do, and that the act relied on ought reasonably to be inferred to be within the scope of the apparent authority implied from such acts. 2 Wood, Ins. § 420; *Smith v. Insurance Co.*, 47 Hun (N. Y.) 37; *Pierce v. People*, 106 Ill. 23, 46 Am. Rep. 683; *Insurance Co. v. Crutchfield*, 108 Ind. 518, 9 N. E. 458; *Kausal v. Association*, 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776.

It is contended, however, that these principles do not apply to the case at bar, by reason of this provision contained in the policy, viz.: "In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company." It is difficult, however, to perceive how this clause can be made applicable in this case. The purpose of the provision could not have been to take from the insurance company the power to appoint an agent by parol, and thereby, in many cases, to secure immunity from the consequences of its own acts. If the clause is to be so construed as that although the company has expressly, or by acts which warrant the implication, appointed an agent, yet it shall not be responsible for the conduct of such agent, while acting within the scope of his real or apparent authority, unless such appointment is in writing, then the clause is a mere trap to ensnare the unwary policy holder, and a device by which an insurance company, for its own purposes, may abrogate and repeal the fundamental principle of the law of agency. The object of the insertion of the clause was to protect the company from the statements, knowledge, and acts of persons connected with the procuring of the policy, by the clear understanding of the parties to the contract that in any matter relating to such insurance no person, unless duly authorized in writing, shall be deemed its agent. *Banking Co. v. Teiger*, 90 Va. 277, 18 S. E. 195; *Grace v. Insurance Co.*, 109 U. S. 278, 3 Sup. Ct. 207, 27 L. Ed. 932; *Arthurholt v. Insurance Co.*, 159 Pa. 7, 28 Atl. 197, 39 Am. St. Rep. 659; *Insurance Co. v. Lee*, 73 Tex. 641, 11 S. W. 1024.

In this case the uncontradicted evidence was that the employment of Coale & Son by the insured extended only to the procurement of the policy. Their duty was "to place the policy." This being so, when the policy was delivered, their functions were ended so far as the appellees were concerned. The policy was sent to Mr. Coale, and by him delivered to Mr. Bosley. To Mr. Coale was also

sent the receipt for the premium which he collected, and remitted to Mr. Kelley, retaining his commissions. One year later the renewal receipt was forwarded to Mr. Coale; and, when it was delivered, he again collected the premium. That it was intended by Mr. Kelley that Coale should collect the premium, and remit to him, was left by the instruction to be determined by the jury. The course of dealing between Coale and Kelley in relation to this and other policies, the inclosure to Coale of the renewal receipt, and Kelley's letter of October 6, 1892 (in which he writes to Coale, "We seem to be without your remittance," etc., "and will thank you to send the same forward at once"), were all before the jury, and tended to prove what that intention was. If they found the intention was that Coale should deliver the receipt and collect the premium, these payments to him were equivalent to payment to the company. * * * Affirmed.

2. TIME AND MODE OF PAYMENT^a

KENYON v. KNIGHTS TEMPLAR & MASONIC MUT. AID ASS'N.

(Court of Appeals of New York, 1890. 122 N. Y. 247, 25 N. E. 299.)

Action on a benefit certificate issued by the defendant association on the life of Alexander M. Kenyon. A judgment for plaintiff was affirmed by the general term of the supreme court for the fourth department, and defendant appeals.

BRADLEY, J.^b * * * The further question upon the merits is whether the jury were, by the evidence, permitted to find that the certificate of insurance was in force at the time of the death of the member.

It is urged by the defense that the contract had terminated, and the right of the plaintiffs to assert any claim against the defendant upon it forfeited, by reason of the default of Kenyon in making payment of an assessment, as required by it. The certificate contained the provision that, if any assessment should not be paid within 10 days after notice provided by the by-laws for its payment, at the office of the defendant in the city of Cincinnati, Ohio, unless otherwise expressly agreed in writing, or to its agents on production of a receipt signed by the president, vice-president, or secretary, the certificate should cease and determine; and by a by-

^a See Cooley, *Briefs on the Law of Insurance*, vol. 3, p. 2316.

^b Part of the opinion is omitted and the statement of facts is rewritten.

law indorsed upon the certificate it was also provided that "any member, failing to pay his assessment within ten days after such notice has been served upon him, shall forfeit his certificate of membership in the association, and all benefits therefrom; any member having forfeited his membership by failing to pay his assessments may be reinstated, he being alive, within thirty days after said notice was sent, he paying all arrearages,"—and that such notice might be sent by mail, and when so sent should be deemed a sufficient notice for the payment of the assessment required. This, with what appears in the application upon the subject, was the contract between the parties in that respect, and, as such, effectual to govern their rights, except so far as it may have in some manner been modified or strict compliance with such provisions waived. On March 27, 1885, the secretary of the defendant at Cincinnati mailed, addressed to Kenyon, at Watertown, N. Y., a notice that an assessment of \$4.75 on his certificate was then due, and payable on or before April 6, 1885; and added: "Assessments are payable at this office in cash, by sight draft on Cincinnati or New York banks, money order, or American or U. S. Express Co. money order, payable to Charles Brown, secretary;" and that the receipt was held at the defendant's home office, where he could get it until April 6th, inclusive, on payment of the amount, and where he could pay it after that date. The default alleged was in the payment of that assessment.

This the plaintiffs seek to meet by the fact, which the evidence on their part tended to prove, that the member, on April 4, 1885, sent by mail from Watertown his check, drawn upon a bank there for the amount, to the defendant's secretary at Cincinnati, payable to the order of the latter. It was sent sufficiently early to reach by due course its place of destination within the 10 days mentioned in the notice, but it was not received by the defendant's secretary, and, if it had reached him within that time, he would not have been required to accept it in performance of the contract, as represented by its terms before mentioned. But the course of dealing between the parties had been such that the member was at liberty to assume that his check upon the bank was receivable by the defendant, because it had, uniformly and without objection, received his checks in payment for assessments upon the certificate. So far the defendant had waived strict performance, and permitted the member to pay in his checks as a substitute for the method of payment mentioned in the notice. It appeared that, within a little more than a year and a half preceding the time of this assessment, Kenyon had sent to the secretary 15 checks, drawn by him as this was, and upon the same bank at Watertown, in payment of assessments, and that they were so received; but it is contended that the receipt at the home office of the defendant of that which the assured was permitted to deliver in payment was essential to accomplish it. That

is the rule when nothing appears to the contrary. *Insurance Co. v. Davis*, 95 U. S. 425, 24 L. Ed. 453. And such was the effect of the contract in question, and, as we have seen, not modified by the terms of the notice of assessment. The method of doing it through the mail had been adopted by the assured, and, although many of the checks before sent in that manner were not received, nor were some of them sent, until after the expiration of the 10 days following the notice, no question had been raised. If that can be treated as waiver of prompt payment, it is entitled to consideration.

But it is with much force suggested that payment within 30 days after notice was the right of the assured, and, when so made, would operate to reinstate his relation of membership, which had been terminated by his default in payment during the first 10 days, and therefore furnished no evidence of any indulgence by the defendant or extension of the time for payment. It is difficult to see any waiver of payment within the time and at the place provided for by the contract, unless the circumstances were such as to permit the assured to understand, from the action of or the course of dealing with the defendant, that the deposit of the check, properly indorsed and directed, in the mail in due time, was a compliance with its requirement to save him from default, and his contract of insurance from forfeiture; or, unless what occurred by way of correspondence between him and the defendant after he had so mailed the check may have been treated as such waiver, by reference to which this appears. On April 10th the secretary wrote Kenyon, saying that his assessment, payable on or before April 6th, was yet unpaid; that he could pay it, if living, any time before April 27th. "Until such payment is made, you are carrying your own risk in case of death;" and after expressing the wish that Kenyon remain a member of the association, and saying that, if the assessment was not paid within that time, he would forfeit the certificate, added: "Remit by bank-check, postal order, or American Express Co. order." In a letter of date 13th April to the secretary, Kenyon stated that he paid the assessment April 4th; and, before the secretary's letter in reply reached its destination, Kenyon had died. Those letters do not, of themselves, furnish evidence of purpose of the defendant to waive the payment not made within the 10 days. It called the assured's attention to the right the contract gave him, and recognized his right to pay by bank-check. Further consideration is due to the effect of the prior transactions between the parties in relation to the assessments, and the manner of paying them, upon the rights of the parties, arising out of the notice and attempted remittance in question. The conditions inserted in a contract of insurance for the benefit of the company making it may be waived by it. And in *Insurance Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841, it was said by the court "that forfeitures are not favored in the law, and that courts are always prompt to seize hold of any circumstances that indicate an

election to waive a forfeiture, or an agreement to do so, on which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will and ought to estop the company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract." And substantially to the same effect are *Meyer v. Insurance Co.*, 73 N. Y. 516, 29 Am. Rep. 200; *Wyman v. Insurance Co.*, 119 N. Y. 274, 23 N. E. 907; *Helme v. Insurance Co.*, 61 Pa. 107, 100 Am. Dec. 621.

If the check had been mailed, addressed to the secretary by the direction of the defendant, the member would not have been in default, although it was not received; assuming, as we may, that he had the funds in the bank to meet it. *Palmer v. Insurance Co.*, 84 N. Y. 63. There was no express agreement or direction to that effect, and that method of remittance was, for all purposes, at his risk, unless the course of dealing with the defendant enabled him to believe and understand that the mailing of it would be effectual to protect him against forfeiture. 2 Greenl. Ev. § 525; *Gurney v. Howe*, 9 Gray (Mass.) 404, 69 Am. Dec. 299; *Crane v. Pratt*, 12 Gray (Mass.) 348; *Morgan v. Richardson*, 13 Allen (Mass.) 410.

The distance between the place of residence of the assured and the defendant's home office was such that payment of assessments by his personal delivery at the latter place evidently was not contemplated; and, so far as appears, the defendant was satisfied with the method of remittance from him directly to its officer by mail, and such means of transmission may have been within the expectation of the parties in view of their situation; and doing it through the postal service might very well be deemed no less safe and appropriate than any other manner to make payments by means of bank-checks. *Buell v. Chapin*, 99 Mass. 594, 97 Am. Dec. 58. As this had been uniformly the manner of transmitting and accepting payment, or the means of payment, of assessments, adopted by the parties, it may be said that the postal medium of transmission had in some sense become a matter of usage between them, having the nature of an implied agreement to that effect. In that view it is not essential, for the purpose of the question, that the mailing or reception of the check should constitute actual payment, or that it should have operated as such during the life of the assured. *Maher v. Insurance Co.*, 67 N. Y. 283. The parties apparently had acquiesced in that method of representing the amount, as well as in the means of transmission, and the conclusion was warranted that, by the course of dealing adopted by the defendant in that respect, the assured may fairly, and in good faith, have been led to suppose that the requirement of the defendant upon him was satisfied by mailing, as he did in his customary manner of doing it, the check

for the amount of the last assessment. The proposition was not necessarily overcome by the fact that the other checks were received prior to the time the assured had the right to make payment, although that may properly have been a matter of consideration by the jury upon the question submitted to them. * * * Affirmed.

GUILFOYLE v. NATIONAL LIFE ASS'N.

(Supreme Court of New York, Appellate Division, Second Department, 1899.
36 App. Div. 343, 55 N. Y. Supp. 236.)

Action by William E. Guilfoyle against the National Life Association. There was a judgment for plaintiff, and defendant appeals.

HATCH, J. This action is brought to recover upon a contract of insurance issued by the Mutual Benefit Life Association of America, and subsequently transferred to the defendant. The question presented by the appeal relates solely to the sufficiency of a payment of the premium due upon the policy prior to the death of the insured. It appeared in the evidence that the contract of insurance was issued in 1884. After its assumption by the defendant, it sent to the insured, pursuant to its contract, from time to time, notices of premiums due from the insured thereunder.

It does not clearly appear in the testimony who paid the first premium, but for the most part the premiums were paid by the plaintiff, who, with his sister, were the beneficiaries named in the policy; and, she having assigned her interest to the plaintiff, he is now the sole beneficiary therein. After the plaintiff began to pay premiums, the usual course was for the insured to receive premium notices and deliver them to the son, who, except in one or two instances, when he paid by post-office money order, inclosed the notices, with a check, in an envelope furnished by the defendant, directed to its home office, in Hartford, Conn.; and thereafter the notices, stamped "Paid," were returned to the insured. The premium notice first sent out by the defendant provided that payment of premium should be made at the home office in Hartford, and, pursuant to such notice, it recognized payments made by check and sent through the mail. Under such a notice it has been held that payment by check deposited in the post office prior to the date when the premium was due was a good payment, even though it was not received at the home office until after the date when the premium became due. *Primeau v. Association*, 77 Hun, 418, 28 N. Y. Supp. 794, affirmed in the court of appeals 144 N. Y. 716, 39 N. E. 858.

Some time after 1894, and as early as June 29, 1895, the defendant attached to its notice for the payment of premiums, in addition to what it had previously contained, the following statement: "We inclose you an envelope directed to the company, for your convenience

in case you remit by mail. But it must be distinctly understood that the association is not, and cannot be, responsible for any loss or delays of the mails. Mailing of the amount of premium is not payment. It must reach the home office on or before the date due, in order to prevent the policy from lapsing." This appeared in fine type, attached to the foot of the notice. It does not appear that the defendant gave any notice to the insured of this change in its requirement, or that it took any other steps to call the attention of the insured to the change in this regard. The plaintiff testifies that he had no notice of such change, and that it was not called to his attention until the trial of the action, and then by his attorney. No change was made in the manner or method of making the payments of premium after the change in the notice, and the defendant continued, as before, to receive an envelope directed in the same manner as had been used under the prior form of notice.

The question, therefore, which we are called upon to decide, is whether the plaintiff or the insured, in making the payments, was bound to take notice of the character of the change contained in its printed statement attached thereto. We think that the plaintiff was not conclusively bound, as matter of law, by the statements contained in such notice. On the contrary, we think that the question whether the defendant took such steps as were fairly calculated to apprise the insured, or the person making the payments, of the change contained in the statement, was one of fact for the court or a jury to determine. It is quite clear that it would be most unfair to the insured to permit him to make payment in reliance upon a course of business which the defendant had permitted, if not invited, and under which the insured was protected when he had placed the check in the envelope furnished by the defendant, paid the postage thereon, and deposited the same in the post office. If the defendant desired to change the system, and place the risk of safe transmission through the mail upon the insured, when he had theretofore relied upon its being good, it should in plain and unmistakeable terms call the attention of the insured thereto, in order that he might have an opportunity to protect himself by making payment in another manner.

It is matter of common knowledge that changes vital in character may be easily made by notice inserted by the defendant in its printed matter, and yet the same not be noticed by the insured, nor placed in such form as would be calculated to attract his attention. In the present case that part of the notice which called for the payment of premium was not changed from what it had theretofore been. At least, if there was change, it related to the amount of the assessment, and did not embrace words showing any change in the manner of payment. The language which made the present change was simply an addition in the body of the printed matter, which had always appeared upon the premium notice; so that a person receiving this notice, so far as its general appearance is concerned, would find nothing

about it that attracted his attention to the pregnant matter which the fine print contained, and under such circumstances might well assume that the notice was the same as that which had theretofore been sent out, and that no change was contemplated upon the part of the defendant. That the question is one of fact, under such circumstances, has been decided. *Van Bokkelen v. Association*, 90 Hun, 330, 35 N. Y. Supp. 865. The failure of the mail to deliver the letter containing the check at the home office cannot avail to defeat the payment. When the letter, properly stamped, was deposited in the mail, payment was accomplished, under the circumstances of this case, and the delivery of the letter at the home office was thereafter at the risk of the defendant. *Palmer v. Insurance Co.*, 84 N. Y. 63.

In the present case the court has found that the deposit of the check, under the circumstances presented in the record, constituted a good payment of the premium. While it is true that the learned court based its decision to some extent upon the ground of waiver, yet this court is not concluded thereby. Having made a concise statement of the grounds of its decision, without stating separately the facts found and the conclusions of law, the whole question is before this court for determination (Code Civ. Proc. § 1022); and we see no reason why we should depart from the holding of the court that the payment was a good payment, based upon the ground that no notice of any change as to the effect of the payment by check was ever brought to the attention of the insured or of the plaintiff, and that the form in which the notice was given was not of such a character as was reasonably calculated to call attention to the vital change which it effected.

It was not suggested upon the trial that the check which was mailed was not a good check. The defendant stood solely upon the effect of the notice which it had given, and, consequently, cannot now be heard to raise any such question. Besides, the plaintiff at all times stood ready to make payment in money, which the defendant refused to receive.

We see no reason for disturbing the judgment of the trial court. It should, therefore, be affirmed, with costs. All concur.

STINCHCOMBE v. NEW YORK LIFE INS. CO.

(Supreme Court of Oregon, 1905. 46 Or. 316, 80 Pac. 213.)

Action by Idonia Stinchcombe against the New York Life Insurance Company. From a judgment of dismissal, plaintiff appeals.

George W. Stinchcombe made application, May 5, 1894, to defendant for insurance on his life in the sum of \$2,000, payable to his wife, the plaintiff. Among other things, it was stipulated by the applicant that any policy that might be issued should not be in force

until the actual payment to and acceptance of the premium by the company or its authorized agent during his (the applicant's) lifetime and good health. The defendant signed and issued its policy on July 10th following, which was transmitted to Stinchcombe, who accepted it and paid the premium of \$70.40, being for two years, on the 24th of the same month. The policy provides, and it is so conditioned, that it is made in consideration of the written application therefor, and of the agreements and warranties therein contained, which are made a part of the contract, and in further consideration of \$70.40, to be paid in advance by the insured (being premium for two years' term insurance), and of the payment of \$47.40 (being the life premium), on the 5th day of May every year thereafter during the continuance of the policy.

The benefits and provisions placed on the next page of the policy were also made a part of the contract. Among such provisions are found these:

"All premiums are due and payable at the home office of the company unless otherwise agreed in writing. * * * If any premium is not thus paid on or before the day when due then (except as hereinafter otherwise provided) this policy shall become void, and all payments previously made shall remain the property of the company.

"A grace of one month will be allowed in payment of premiums on this policy, subject to an interest charge of five per cent. per annum for the number of days during which the premium remains due and unpaid.

"During said month of grace the unpaid premium, with interest as above, remains an indebtedness due the company, and in the event of death during the said month, this indebtedness will be deducted from the amount of the insurance.

WOLVERTON, C. J.¹⁰ The first question presented in the logical course of inquiry is whether the policy had lapsed prior to the decease of Stinchcombe, July 3, 1896. By its terms the life premium of \$47.40 is made payable on the 5th day of May in every year "thereafter," the premium for two years in advance having been paid on July 24, 1894. Under a condition of the application, the policy was not to be in force until the actual payment to and acceptance of the premium by the company, and during the lifetime and good health of the applicant. There was no binding receipt issued by the company, or its agent, putting the insurance in force from the date of the application, to wit, May 5, 1894, subject to the condition of its acceptance by the company and the issuance of the policy, as is sometimes done.

We have therefore only to look to the terms of the policy to ascertain when it became effective as an insurance upon the life of Stinchcombe, and to determine the conditions upon which it might be con-

¹⁰ Part of the opinion is omitted and the statement of facts is rewritten.

tinued in force, as well as those the nonobservance of which would entail a forfeiture. There was a care, it will be seen, on the part of the company, that the policy should not be in force—that is, that the company should not itself become liable—except on the concurrent existence of certain conditions, namely, the actual payment of the premium during the lifetime and good health of the applicant. He might have been living and in good health, but without the actual payment of the premium no liability would have been incurred on its part, and that because, as the condition reads, the policy “shall not be in force.” Now, if it was intended that the policy should become effective as against the company only when these conditions were fulfilled on the part of the applicant, what is there in the contractual relations to put it in force or to cause it to become operative as against the applicant in the meantime? There are no other stipulations indicating an intendment of that nature, and, as we have seen, there is no binding receipt putting it into effect at once, either conditionally or otherwise. The policy was issued on July 10, 1894, and, if left to the provisions on the face of it alone, would ordinarily have been effective from that date; but the application is made a part of it, and so are the conditions and provisions on the next page following the signatures of the officers of the company, and all must be construed together to get at the true intendment of the parties as they are, and constitute in reality but one contract.

If, therefore, the policy was not to be in force to bind the company until the concurrence of the conditions designated, it is a most reasonable and fair deduction that it was also not intended that it should become effective as it concerned the assured at a date prior to their fulfillment. The defendant either insured Stinchcombe from the 5th day of May, or it did not insure him until the 24th day of July, when the policy was delivered and the premium paid and accepted by it. It is certain that it did not make itself liable until the latter date, and are we to suppose that, without engagement to that purpose, the company intended to collect the premium and the insured to pay for insurance he did not have? Rather would the deduction be to the contrary. And such is our interpretation of the contract, that it did not become effective and binding as an insurance upon the life of Stinchcombe until such latter date, either to fix the liability of the company or to require the insured to pay for insurance in the meanwhile.

Now, the \$70.40 paid for two years' insurance. It is so expressly stated in the policy as follows: “Being the premium for two years' term insurance.” This insurance began with the date of July 24, 1894, by the delivery of the policy and the payment and acceptance of the premium, and Stinchcombe's life became insured, not alone for the term of two years, but for the entire term fixed by the policy according to its provisions, but subject to forfeiture for the failure to perform those conditions subsequent as might entail such a result, among

which are those relating to the prompt payment of the premiums. *New York Life Ins. Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789. By one of the conditions on the next page, so denominated, a grace of one month is allowed in the payment of the annual premiums, subject to an interest charge, so that on the face of the contract there was accorded the insured 25 months in which to make the second payment of premium, thus extending the time to June 5, 1896. Such premium not having been paid before that date, a forfeiture was incurred, but when did it become operative? At once upon the default in meeting the payment, or at the end of the time for which the insured had paid for his insurance?

It is argued that the forfeiture clause is direct and unmistakable, and indicates an intendment that the policy should become at once void by reason of the nonpayment of the premium on the day it was demandable. It does not say so, however, but that it "shall become void." The interpretation would deprive the assured of a period of the insurance that he had actually paid for, to wit, from June 5th to July 24th, so that the forfeiture, in that view, would not only incur the penalty of depriving the assured of his right to continue under the contract, but also of cutting short by a most appreciable term the insurance absolutely obtained by payment of the premium for two years in advance. There is here a palpable incongruity, and, if the company's contention be the correct one as to the proper interpretation of the contract, it is perfectly manifest that it will be fraught with injustice to the beneficiary. It is very well understood, a condition arising from an innate sense of justice, that the law in its policy and spirit is averse to the declaration of forfeitures, and will not entail such consequences as between individuals but in pursuance of the plain and obvious intendment of contractual relations. It is also a canon of the construction of contracts, so well settled as to need no citation of authorities to support it, that inconsistent provisions rendering it doubtful or uncertain whether, or under what conditions, a forfeiture was really intended, will be so interpreted, whenever they can, within the bounds of reason and common fairness, as to elude the forfeiture and secure to the parties that to which they are in justice entitled. Beyond this there is another rule that, as between inconsistent, conflicting, and incongruous provisions, of doubtful and ambiguous significance, in a policy of insurance, it being manifest that the form and all the necessary conditions are the statements, essentially, of the officers, agents, and attorneys of the company, the construction most favorable to the assured will be adopted and applied. *Fenton v. Fidelity & Casualty Co.*, 36 Or. 283, 56 Pac. 1096, 48 L. R. A. 770; *Stringham v. Mutual Life Ins. Co.*, 44 Or. 447, 75 Pac. 822; *National Bank v. Insurance Co.*, 95 U. S. 673, 24 L. Ed. 563; *McMaster v. New York Life Ins. Co.*, 183 U. S. 25, 22 Sup. Ct. 10, 46 L. Ed. 64.

Now, applying these plain and obvious canons of construction and interpretation, it is neither inconsistent with reason nor fair dealing

to conclude that the true intendment of the contract, looking through the whole of it, including the application, the policy, and the provisions on the next page, is that there should be no forfeiture of the insurance paid for—that is, of any part of the “two years’ term insurance”—and that the policy was not rendered void, as affecting such term or period, until its time had fully run. This does not take into account the effect of the provision touching the month of grace for making the payment, because not involved here. Such, in effect, is the holding of the Supreme Court of the United States in *McMaster v. New York Life Insurance Company*, *supra*. In reality, this is a much stronger case than that for the beneficiary. It does no injustice to the insurance company having received the stipulated consideration, and it conserves to the insured or his beneficiary that for which he has actually paid his money in the way of premium.

* * * Reversed.

MICHIGAN MUT. LIFE INS. CO. v. BOWES.

(Supreme Court of Michigan, 1879. 42 Mich. 19, 51 N. W. 962.)

Assumpsit by Mary E. Bowes against the Michigan Mutual Life Insurance Company. Judgment for complainant. Defendant brings error. Affirmed.

COOLEY, J. There are no disputed facts in this case. On the 15th day of November, 1873, the plaintiff in error issued to Mary E. Bowes, the defendant in error, a policy of insurance by which the payment of \$10,000 was assured to her on the death of her husband, William R. Bowes, in consideration of the payment of an annual premium of \$434.80. Mr. Bowes himself effected the insurance, and, instead of paying the first premium in money, gave his note therefor. November 15, 1874, the second premium was paid, and the note which was given for the first was taken up. November 15, 1875, Mr. Bowes gave his note for the third premium, less \$62, the amount of certain allowances made to him by the insurer. November 15, 1876, the amount of this note was added to the fourth premium, and two notes were given by Mr. Bowes therefor, one of \$538.83, due in 7 months, with 10 per centum interest, and one of \$222.39, due in 60 days. This last note when it fell due was renewed for 90 days, and was made to bear 10 per centum interest. Neither of these notes was ever paid. The premium which fell due on November 15, 1877, was not paid, nor was any note or other security given for it. Mr. Bowes died November 17, 1878.

It was provided in the policy that, if the premiums should not be paid when due, the company should not be liable for the payment of the sum insured, or any part thereof, and the policy should cease and determine, excepting only that on the surrender of the policy duly receipted, within one year after an accrued premium was due, the in-

sured being then alive, the company would issue a paid-up policy for the amount the surrender value would purchase as a single premium. Claiming that the notes were, in legal effect, payments of the premiums for which they had been given, Mrs. Bowes on November 8, 1878, tendered to the company a surrender of the policy, and demanded a paid-up policy for the surrender value, which the company refused to issue while the notes remained unpaid. The surrender value would at that time have purchased a paid-up policy for \$1,210.85. For this sum Mrs. Bowes thereupon brought suit, and in the circuit court recovered judgment.

There was no express agreement to receive the notes in payment of the premiums, and it is therefore insisted that, according to the well-settled rule in this state, they cannot amount to payment until actually paid. *Gardner v. Gorham*, 1 Doug. 507; *Hotchin v. Secor*, 8 Mich. 494. It appears, however, that renewal receipts were given when the notes were taken, so that by the express act of the company the policy was kept alive, and the company precluded from any right to insist upon a forfeiture up to November 15, 1877.

In determining whether the notes shall be considered payments, it is important to note that the paper given for premiums was not the paper of the insured. It was, indeed, the paper of the person on whose life the risk was taken, but, had Mrs. Bowes given the paper of any third person, the case would have been no different. The company has taken the paper of another person than the assured for the premiums the assured was to pay, and, if the paper is paid, will receive a large interest thereon. Now, although it is conceded that the taking of this paper was for the accommodation of the assured, it is nevertheless a legal presumption that the insurer found it to its interest to make the arrangement, so that the delay in the payment, in consideration of the promise to pay interest, is to be considered as agreed upon for the mutual advantage of the parties; and, had the notes been paid at any time prior to the demand for a paid-up policy, it cannot be disputed that Mrs. Bowes would have been entitled to receive it.

But, although the notes were not then paid, the insurance company had an undoubted right to proceed and collect them, together with the interest, which was the legal inducement for giving credit. The company might also have sold them, and this, as between the company and Mrs. Bowes, would have been equivalent to collection; and the notes, so far as we know, remain in the hands of the company as its property to this day, and may be collected of the estate of Mr. Bowes, if that is solvent.

Under these circumstances, we are of the opinion that the insurance company is precluded from denying that the notes were taken in payment for the premiums. As has been stated above, there could have been, under the circumstances, no forfeiture of the policy prior to November 15, 1877. It was in full force at that day, and, if the

premium then falling due had been tendered, the company could not have refused it because of the notes remaining unpaid. Now, although the contract provides that a policy for the surrender value must be demanded within one year from the time an accrued premium was due, we think this means an accrued premium for the non-payment of which the company had a right to determine the policy; and there was no such accrued premium due until November 15, 1877, the company having expressly renewed the policy to that day.

There is another consideration which is not unimportant. The fair meaning of the policy, and of the statute in accordance with which it was given, is that the insured, when he becomes unable or for any reason fails to keep up his payments, shall have the advantage of all he has made, in a paid-up policy proportioned to the amount. If, instead of receiving currency, the company has taken the commercial paper of third persons, which may be collected afterwards, it is obvious that the assured cannot have the full benefit of his contract, unless such paper is treated as payment. Suppose, for example, that Mr. Bowes were still living, and that his notes should now be collected, it is manifest that the company would then receive the full benefit of the contract on its side, including full consideration for the delay, but that the insured would be wholly deprived of the benefit promised to her in a surrender policy, if any other view were taken than is here adopted.

We think the judgment must be affirmed, with costs. If in this particular case the company proves to be a loser in consequence of the insolvency of the maker of the notes, it is a result that can be provided against in the future by express stipulations.

IV. Forfeiture ¹¹

PERRY v. BANKERS' LIFE INS. CO.

(Supreme Court of New York, Appellate Division, First Department, 1900.
47 App. Div. 567, 62 N. Y. Supp. 553.)

Action by Marie B. Perry against the Bankers' Life Insurance Company of the City of New York. From a judgment for plaintiff, defendant appeals.

RUMSEY, J.¹² The action was brought to recover on a policy of life insurance issued to the plaintiff's husband in September, 1895,

¹¹ For discussion of principles, see Vance on Insurance, § 77. See, also, Cooley, Briefs on the Law of Insurance, vol. 3, pp 2257-2434.

¹² Part of the opinion of the court, as also the dissenting opinion of Patterson, J., are omitted.

and payable at his death to her. The insured died on the 27th of March, 1898. The necessary steps were taken to entitle the plaintiff to the payment of the policy, and the only defense is that it has been forfeited by nonpayment of the premium said to be due on the 21st day of March, 1898. * * *

The policy was made on the 21st day of June, 1895, upon an application which is found in the case, and dated the 24th of April in the same year. It was stated in the application that the premiums were to be paid quarterly (\$23.50). The policy purports to have been issued in consideration of the application, and of all statements made therein and to the medical examiner, and of the stipulations and agreements on the back of the policy, all of which were made a part of the contract, and in further consideration of the sum of \$23.50 in full payment of the first premium on this policy from this date until the 21st day of September, 1895, and the further payment of all premiums coming due on this policy in accordance with its terms and the constitution and by-laws of the company. The policy itself contains upon its face nothing further with regard to the payment of the premiums. There is upon the back of the policy something over a page of print, which is headed, "Stipulations and Agreements." All that is said with regard to the payment of premiums in these stipulations is that they may be paid annually, semiannually, or quarterly, in accordance with the rates in the following table, subject to deduction by dividends as aforesaid; and that any unpaid semiannual or quarterly installment of the current year's premium, or any indebtedness to the company, will be deducted in the settlement of the policy; and the further provision that each premium is due and payable at the home office of the company, but, for convenience, it will be accepted by an authorized agent at some other place. There is nothing else, either in the policy or in the stipulations and agreements, with regard to the payment of premiums. The by-laws contain a provision that premiums must be paid on the day they become due by the terms of the policy, and a failure to pay the same on that day will work a forfeiture of the policy and all benefits thereunder. But this provision is not made a part of the policy, by its terms.

It is alleged that a premium which was due on the 21st of March, 1898, was not paid, and for that reason it is said that the policy had become forfeited. The rule is well settled that no strained or forced construction of a contract will be resorted to for the purpose of establishing a forfeiture, but that, to warrant a party in insisting that his adversary has forfeited any rights which he would be entitled to by a contract between them, he must put his finger upon the specific provision of the contract which requires the party against whom the forfeiture is alleged to do the thing the failure to do which is relied upon to work a forfeiture. The breach of the contract here, upon which the defendant insists as constituting a forfeiture, is a failure to pay the premium when it became due by the terms of the policy.

and so it is essential to see when it did become due by those terms of the policy.

It will be noticed that there is no direct agreement on the part of the plaintiff, nor any requirement in the policy, or in the stipulations and agreements which are made a part of it, or in the application, that the premiums shall be paid on any particular day. The amount of the premiums is fixed. It is to be \$23.50, payable quarterly; and the first premium paid at the date of the policy is said to be a payment up to the 21st day of September, 1895, and it is said that the other premiums are to be paid quarterly. But it is nowhere said, either in the application or the policy or the stipulations and agreements, that they are to be paid on any particular day; and from the provision in the stipulations and agreements, that any unpaid quarterly installment of the current year's premium will be deducted in settlement of the policy, it is fairly to be inferred that there was in the minds of the parties at the time the contract was made an intention that the quarterly premiums might not necessarily be paid at the end of the quarter, which in this case was the 21st of March, 1898.

In order to establish that the payment of the premiums was to take place on the 21st of March, the defendant resorts to an indorsement on the back of the policy, which is as follows:

"No. 1,544. Bankers' Life Insurance Company of the City of New York. Insurance on the Life of N. W. Perry.

"Amount, \$5,000.

"Premium, \$23.50.

"Payable on the 21st day of June, Sept., Dec., Mch.

"Dated June 21, 1895."

This is the usual indorsement put upon every insurance policy by the company before it is issued, and, although it is on the back of this policy, it is no part of the stipulations and agreements, which alone are made a part of the policy, and constitute the contract between the parties. Therefore, although this indorsement may be regarded, perhaps, as a suggestion of what was intended by the defendant, it cannot, except by a very strained construction, be said to be any part of the policy, so as to be binding upon the plaintiff, or to constitute any of its terms, so that a violation of a suggestion contained in it shall be sufficient to forfeit the policy.

But it is said that a construction has been put upon the policy by the act of the parties, as the result of which the premium became payable on the 21st of March, 1898. It is undoubtedly true that a notice was given to Perry, from time to time, that a particular premium coming due at a particular time had not been paid; and it is quite probable that whenever he received that notice he complied with the demand of the defendant by giving it a certificate of health, if he paid the premium after the 21st day of the month. But those acts do not constitute any part of the terms of the policy, for the purpose of authorizing a forfeiture. If, when this notice had been served upon

Perry, he had said that the contract did not provide for the payment of a premium on the 21st day of September, 1895, but that he had a reasonable time to pay it, no one could have said that he had violated the terms of the policy; and the fact that he acceded to this demand does not change his rights to insist upon the precise terms of the policy, when the defendant tries to forfeit the terms of the contract.

The judgment must be affirmed, with costs. All concur, except PATTERSON, J., who dissents.¹³

V. Excuses for Nonpayment¹⁴

THOMPSON v. KNICKERBOCKER LIFE INS. CO.

(Supreme Court of United States, 1881. 104 U. S. 252, 26 L. Ed. 765.)

Error to the circuit court of the United States for the Southern district of Alabama.

This was an action on a policy of insurance for \$5,000, issued by the Knickerbocker Life Insurance Company, the defendant in error, on the life of John Y. Thompson, for the benefit of his wife, Ruth E. Thompson, the plaintiff in error. The policy bore date Jan. 24, 1870, and was to continue during his life, in consideration of an annual premium of \$410.20, payable on or before the twenty-fourth day of January in every year. He died Nov. 3, 1874. The complaint was in the usual form, setting forth the contract contained in the policy, his death, and the performance of the conditions of the policy by him and the plaintiff. The company pleaded the general issue, and two special pleas, which set up in substance the same defence. The second plea, after setting forth the provisions of the policy for the payment of the annual premium, proceeds as follows:

"Under said policy an annual credit or loan of a portion of said premium was provided for, and said policy also contained a condition or proviso that the omission to pay the said annual premium on or before twelve o'clock noon on the day or days above designated for the payment thereof, or that the failure to pay at maturity any note, obligation, or indebtedness (other than the annual credit or loan) for premium or interest due under said policy or contract, shall then and thereafter cause said policy to be void without notice to any party or parties interested therein.

¹³ Compare *New York Life Ins. Co. v. Statham*, ante, p. 140.

¹⁴ For discussion of principles, see *Vance on Insurance*, § 78. See, also, *Cooley, Briefs on the Law of Insurance*, vol. 3, p. 2328.

"The defendant further says that the said annual premium was not paid on or before the twenty-fourth day of January, A. D. 1874, and thereupon the defendant did give time for the payment of said premium upon the condition named in the note hereinafter mentioned, and for the payment of said premium did take certain promissory notes of said Thompson, one of which was as follows:

"\$109.

New York, Jan'y 24th, 1874.

"Nine months after date, without grace, I promise to pay to the Knickerbocker Life Insurance Company one hundred and nine dollars, at Mobile, Alabama, value received, in premium on policy No. 2334, which policy is to be void in case this note is not paid at maturity, according to contract in said policy.

"No. 2334 was an error, No. 2331 being intended."

It then avers that the note was not paid when it became due, Oct. 24, 1874, and that by reason thereof the policy became void and of no effect before the death of the assured.

To these pleas four replications were filed, numbered 2, 3, 4, and 5, as follows:

"2. That the said policy of insurance was renewed by said defendant on the twenty-fourth day of January, 1874, and continued in force until Jan. 24, 1875. That the payment of said note at maturity was not a condition precedent as alleged. That the said Thompson had the money in hand, was ready and willing and intended to pay said note, but that before the maturity thereof he was taken violently ill, and before and at the time the same fell due was in bed, prostrated by a fatal disease, and in this condition remained until he died on the third day of November, 1874; that during all this time he was mentally and physically incapable of attending to his business, or knowing of and performing his obligations, and was non compos mentis; that the existence of said note was not known to the plaintiff.

"3. That it was, and had been for many years before, and on the day said note fell due, the uniform usage and custom of said defendant in such cases to give notice of the day of payment to its policyholders; such is and was the uniform usage and custom with all insurance companies, and the said defendant had in all cases adopted and acted on said usage, and in all dealings with said Thompson had adhered to said usage, and gave notice of the day when such payments fell due; yet said defendant in this case failed to give any notice of the day of payment of said note, notwithstanding they knew said Thompson was in the city of Mobile, and was sick. Plaintiff avers that said Thompson was ready and willing to pay, had said notice been served as in previous cases, but acting on said usage he was deceived by want of said notice, and that the plaintiff had no notice of the existence of said note, or when the same fell due, wherefore and whereby said note was not paid.

"4. That on the twenty-fourth day of January, 1874, said policy was renewed and entered in full force for one year, to wit, until Jan.

24, 1875. That said note was for the balance of the premium of that year, which defendant agreed should be deferred and paid as set out on said note; that by said agreement said policy was not to become void on the non-payment of the note alone at maturity as alleged in said plea, but was to become void at the instance and election of said defendant, and plaintiff avers that said defendant did not elect to cancel said policy or take any steps to avoid it or give any notice of such intention during the life of said John Y. Thompson, or since, and still holds said note against said estate of said Thompson.

"5. And for further replication to the first and second special pleas by said defendant pleaded, plaintiff says that it was the general usage and custom adopted by said defendants, and practised by them before and after the making of said note, not to demand punctual payment of such premium notes on the days they fell due, but to give days of grace thereon, to wit, for thirty days thereafter, and the said defendants had repeatedly so done with said Thompson and others, and they led said Thompson to believe and rely on such leniency in this case, and thereby said Thompson was deceived, and said note not paid, and he did rely on them for such notice."

Demurrers to these replications were sustained by the court. The case was then tried upon the plea of the general issue. On the rejection of evidence at the trial, the same questions presented by the replications were raised. Exceptions were taken in due form and preserved on the record.

There was a judgment for the defendant. The plaintiff thereupon sued out this writ of error.

Mr. Justice BRADLEY, after stating the facts, delivered the opinion of the court.

The questions presented for review in this case arise on the rulings of the court below on the demurrers of the defendant.

It appears from the special pleas that the policy contained the usual condition that it should become void if the annual premiums should not be paid on the day when they severally became due, or if any notes given in payment of premiums should not be paid at maturity.

The replications do not pretend that the note given for premium, which became due on the twenty-fourth day of October, 1874, was ever paid, or that payment thereof was ever tendered, either during the life of Thompson or after his death; but it is contended that such payment was not necessary in order to avoid the forfeiture claimed by the defendant.

First, it is contended that the mere taking of notes in payment of the premium was, in itself, a waiver of the conditional forfeiture; and for this reference is made to the case of Insurance Co. v. French, 30 Ohio St. 240, 27 Am. Rep. 443. But, in that case, no provision was made in the policy for a forfeiture in case of the nonpayment of a note given for the premium, and an unconditional receipt for

the premium had been given when the note was taken; and this fact was specially adverted to by the court. We think that the decision in that case was entirely correct. But in this case the policy does contain an express condition to be void if any note given in payment of premium should not be paid at maturity. We are of opinion, therefore, that whilst the primary condition of forfeiture for non-payment of the annual premium was waived by the acceptance of the notes, yet, that the secondary condition thereupon came into operation, by which the policy was to be void if the notes were not paid at maturity.

Beside this general answer the plaintiff set up, in her replications, various excuses for not paying the note in question, which are relied on for avoiding the forfeiture of the policy.

In the second replication the excuse set up is, that before the note fell due Thompson became sick and mentally and physically incapable of attending to business until his death on the third day of November, 1874, and that the plaintiff was ignorant of the outstanding note. We have lately held, in the case of *Klein v. Insurance Co.*, *supra*, that sickness or incapacity is no ground for avoiding the forfeiture of a life policy, or for granting relief in equity against forfeiture. The rule may, in many cases, be a hard one; but it strictly follows from the position that the time of payment of premiums is material in this contract, as was decided in the case of *Insurance Co. v. Statham*, 93 U. S. 24, 23 L. Ed. 789. Prompt payment and regular interest constitute the life and soul of the life insurance business; and the sentiment long prevailed that it could not be carried on without the ability to impose stringent conditions for delinquency. More liberal views have obtained on this subject in recent years, and a wiser policy now often provides express modes of avoiding the odious result of forfeiture. The law, however, has not been changed, and if a forfeiture is provided for in case of non-payment at the day, the courts cannot grant relief against it. The insurer may waive it, or may by his conduct lose his right to enforce it; but that is all.

The third replication sets up a usage, on the part of the insurance company, of giving notice of the day of payment, and the reliance of the assured upon having such notice. This is no excuse for non-payment. The assured knew, or was bound to know, when his premiums became due. *Insurance Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841, is cited in support of this replication. But, in that case, the customary notice relied on was a notice designating the agent to whom payment was to be made, without which the assured could not make it, though he had the money ready. As soon as he ascertained the proper agent he tendered payment in due form. It is obvious that the present case is very different from that. The reason why the insurance company gives notice to its members of the time of payment of premiums is to aid their memory and to stimulate them to prompt payment. The company is under no obligation to give such notice, and assumes no responsibility by giving it. The duty of the assured

to pay at the day is the same, whether notice be given or not. Banks often give notice to their customers of the approaching maturity of their promissory notes or bills of exchange; but they are not obliged to give such notice, and their neglect to do it would furnish no excuse for non-payment at the day.

The fourth replication sets up a parol agreement of defendant made on receiving the promissory note, that the policy should not become void on the non-payment of the note alone at maturity, but was to become void at the instance and election of the defendant, which election had never been made. As this supposed agreement is in direct contradiction to the express terms of the policy and the note itself, it cannot affect them, but is itself void. We did hold, in Eggleston's Case, it is true, that any agreement, declaration, or course of action on the part of an insurance company, which leads a party insured honestly to believe that by conforming thereto a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop the company from insisting upon the forfeiture. An insurance company may waive a forfeiture or may agree not to enforce a forfeiture; but a parol agreement, made at the time of issuing a policy, contradicting the terms of the policy itself, like any other parol agreement inconsistent with a written instrument made contemporaneous therewith, is void, and cannot be set up to contradict the writing. So, in this case, a parol agreement supposed to be made at the time of giving and accepting the premium note cannot be set up to contradict the express terms of the note itself, and of the policy under which it was taken.

The last replication sets up and declares that it was the usage and custom of the defendants, practised by them before and after the making of said note, not to demand punctual payment thereof at the day, but to give days of grace, to wit, for thirty days thereafter; and they had repeatedly so done with Thompson and others, which led Thompson to rely on such leniency in this case. This was a mere matter of voluntary indulgence on the part of the company, or, as the plaintiff herself calls it, an act of "leniency." It cannot be justly construed as a permanent waiver of the clause of forfeiture, or as implying any agreement to waive it, or to continue the same indulgence for the time to come. As long as the assured continued in good health, it is not surprising, and should not be drawn to the company's prejudice, that they were willing to accept the premium after maturity, and waive the forfeiture which they might have insisted upon. This was for the mutual benefit of themselves and the assured, at the time; and in each instance in which it happened it had respect only to that particular instance, without involving any waiver of the terms of the contract in reference to their future conduct. The assured had no right, without some agreement to that effect, to rest on such voluntary indulgence shown on one occasion, or on a number of occasions, as a ground for claiming it on all occasions. If it were otherwise, an in-

insurance company could never waive a forfeiture on occasion of a particular lapse without endangering its right to enforce it on occasion of a subsequent lapse. Such a consequence would be injurious to them and injurious to the public.

But a fatal objection to the entire case set up by the plaintiff is, that payment of the premium note in question has never been made or tendered at any time. There might possibly be more plausibility in the plea of former indulgence and days of grace allowed, if payment had been tendered within the limited period of such indulgence. But this has never been done. The plaintiff has, therefore, failed to make a case for obviating and superseding the forfeiture of the policy, even if the circumstances relied on had been sufficiently favorable to lay the ground for it. A valid excuse for not paying promptly on the particular day is a different thing from an excuse for not paying at all.

Courts do not favor forfeitures, but they cannot avoid enforcing them when the party by whose default they are incurred cannot show some good and stable ground in the conduct of the other party, on which to base a reasonable excuse for the default. We think that no such ground has been shown in the present case, and that it does not come up to the line of any of the previous cases referred to, in which the excuse has been allowed. We do not accept the position that the payment of the annual premium is a condition precedent to the continuance of the policy. That is untrue. It is a condition subsequent only, the non-performance of which may incur a forfeiture of the policy, or may not, according to the circumstances. It is always open for the insured to show a waiver of the condition, or a course of conduct on the part of the insurer which gave him just and reasonable ground to infer that a forfeiture would not be exacted. But it must be a just and reasonable ground, one on which the assured has a right to rely. Judgment affirmed.¹⁵

¹⁵ Existence of war as an excuse for nonpayment of premiums, see *New York Life Ins. Co. v. Statham*, ante, p. 140.

VI. Notice of Premiums Due ¹⁶

MUTUAL LIFE INS. CO. v. COHEN.

(Supreme Court of United States, 1900. 179 U. S. 262, 21 Sup. Ct. 106, 45 L. Ed. 181.)

On writ of certiorari to the United States Circuit Court of Appeals for the Ninth Circuit to review a decision affirming a judgment for life insurance.

On June 10, 1885, the petitioner delivered to Alexander Cohen, in the state of Montana, a life insurance policy for \$3,000, conditioned upon the annual payment of a premium of \$89.61. Upon it the insured paid premiums up to and including June 10, 1892. No subsequent premiums were paid. On September 21, 1897, he died. His wife, Tine Cohen, was the beneficiary named in the policy.

The application commenced in these words: "Application for insurance in the Mutual Life Insurance Company of New York, 140 to 146 Broadway, corner of Liberty street, New York city, subject to the charter of such company and the laws of said state." It further contained this provision: "That if the insurance applied for be granted by the company, the policy, if accepted, will be accepted subject to all the conditions and stipulations contained in the policy." Among those conditions and stipulations was this: "Notice that each and every such payment is due at the date named in the policy is given and accepted by the delivery and acceptance of this policy, and any further notice, required by any statute, is thereby expressly waived."

On November 9, 1898, this action was commenced in the circuit court of the United States for the district of Washington.

The single defense was the nonpayment of premiums after June 11, 1892. There was no suggestion of rescission, abandonment, knowledge by the beneficiary of the nonpayment of the premium, or any refusal or failure on her part in respect to the policy. A demurrer to the answer was sustained, judgment rendered for the amount of the policy, less the unpaid premiums, which judgment was affirmed by the United States Circuit Court of Appeals for the Ninth Circuit (38 C. C. A. 696, 97 Fed. 985), and thereupon the case was brought here on certiorari.

Mr. Justice BREWER delivered the opinion of the court.

Mutual L. Ins. Co. v. Phinney, 178 U. S. 327, 44 L. Ed. 1088, 20 Sup. Ct. 906, was an action against the same insurance company, in the same district, on a policy like the one in controversy here, save that in that the insured was himself the beneficiary. It resulted in a

¹⁶ For discussion of principles, see Vance on Insurance, §§ 79–80. See, also, Cooley, Briefs on the Law of Insurance, vol. 3, p. 2281.

judgment in the circuit court against the company. Thereupon the company sought to transfer it by writ of error to the court of appeals of that circuit, but that court dismissed the writ of error. Thereafter, on April 19, 1897, a certiorari was issued by this court. 166 U. S. 721, 17 Sup. Ct. 1004. On examination we held that the court of appeals erred in dismissing the writ of error, that it had jurisdiction, and that it ought to have reversed the judgment of the circuit court. The decision was based on the ground of error in the ruling of the circuit court in respect to rescission and abandonment. In the opinion we referred to the fact that there was a primary question of the applicability of a statute of the state of New York, but deemed it unnecessary to decide it. That decision was followed by the cases of the same company against Sears (178 U. S. 345, 44 L. Ed. 1096, 20 Sup. Ct. 912; *Id.*, 176 U. S. 683, 20 Sup. Ct. 1032), against Hill (178 U. S. 347, 44 L. Ed. 1097, 20 Sup. Ct. 914; *Id.*, 176 U. S. 683, 20 Sup. Ct. 1032), against Allen (178 U. S. 351, 20 Sup. Ct. 913, 44 L. Ed. 1098; *Id.*, 176 U. S. 683, 20 Sup. Ct. 1032)—all of which cases were disposed of in like manner.

The primary question noticed, but not decided, in those cases is distinctly and solely presented in this.

The insurance policy contained a stipulation that it should not be binding until the first premium had been paid and the policy delivered. The premium was paid and the policy delivered in the state of Montana. Under those circumstances, under the general rule, the contract was a Montana contract, and governed by the laws of that state. *Equitable Life Assur. Soc. v. Clements*, 140 U. S. 226, 232, sub nom. *Equitable Life Assurance Soc. v. Pettus*, 35 L. Ed. 497, 500, 11 Sup. Ct. 822. In that state, there being no statutory provisions to the contrary, the failure to pay the annual premium worked, in accord with the terms of the policy, a forfeiture of all claims against the company.

New York, on the other hand, the state by which the insurance company was chartered and in which it had its principal office, by section 1 of chapter 321 of 1877 had enacted—

“Sec. 1. No life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy hereafter issued or renewed by reason of nonpayment of any annual premium or interest, or any portion thereof, except as hereinafter provided.”

The provision referred to, and which is stated at length in the succeeding part of the section, is one for notice of a special kind and to be given in a particular way. The section is quoted in full in 178 U. S. 330, 44 L. Ed. 1089, 20 Sup. Ct. 906.

This notice was not given. Hence, if the law of New York controls, the policy was still in force and the plaintiff was entitled to recover.

The question therefore is whether the law of New York controls.

The presumption is in favor of the law of the place of contract. He who asserts the contrary has the burden of proof. The New York statute does not purport to change any insurance company charter. On the contrary, its obvious purpose is only to reach business transacted within the state. Proceeding on the accepted principle that a state may determine the conditions, the meaning, and limitations of contracts executed within its borders, the language of the statute reaches contracts made within the state. Undoubtedly a foreign insurance company making a contract within the state of New York would find that contract burdened by its provisions, and equally clear is it that such company making a contract in another state would be free from its limitations. There is no indication of an intent on the part of the legislature of New York to affect, even if it were possible, the general powers of a foreign company coming within the state and transacting business. But on the face of the statute there is no express demarcation between foreign and local companies. There is no attempt to say that a foreign company doing business within the state shall, as to such business, be subject to the prescribed limitations, and that a home company doing business within the state and elsewhere shall as to all its business be so limited. If we cannot from the language impute to the legislature an intent to regulate the business of a foreign company outside of the state, how can we find in such language an intent to prescribe limitations upon the contracts of a home company outside the state? In the absence of an expressed intent it ought not to be presumed that New York intended by this legislation to affect the right of other states to control insurance contracts made within their limits. Can it be that the state of New York, aware of the fact that other states and other countries might by their legislation properly prescribe terms and conditions of insurance contracts, meant by this legislation to restrict its local companies from going into those states and countries and transacting business in compliance with their statutes if in any respect they were found to conflict with the regulations prescribed for business transacted at home?

Again, it is worthy of notice that the state of New York has changed its legislation repeatedly in the last quarter of a century in respect to this very matter of notice. See Laws 1876, c. 341, § 1; the statute now under consideration, Laws 1877; Laws 1892, c. 690, § 92; Laws 1897, c. 218, § 92. The varying provisions of these statutes, directed in terms, not to local companies, but to companies doing business in the state of New York, strengthen the conclusion that the state was not thus changing the several charters of its companies, but prescribing only that which in its judgment from time to time was the proper rule for business transacted within the state.

Again, the terms of the act itself tend in the same direction. It provides for a thirty-day notice. While such a notice might be reasonable as to all policies within the state, yet when it is remembered

that some at least of the New York insurance companies are doing business in all quarters of the globe, it is obvious that a thirty-day notice in many cases would be of little value.

Further, by section 2 the statute provides that an affidavit by one authorized to mail the notice shall be "presumptive evidence" of the giving of the notice. Can it be supposed that the legislature of New York was contemplating a rule of evidence to be enforced in every state and nation of the world?

These considerations lead to the conclusion that the statute of New York, directed as it is to companies doing business within the state, was intended to be, and is, in fact, applicable only to business transacted within that state.

It is not doubted that a contract by an insurance company of New York executed elsewhere may by its terms incorporate the law of New York, and make its provisions controlling upon both the insured and the insurer. And it is urged that, although there is nothing in the policy to indicate this, the language of the application has that effect. It recites that it is "subject to the charter of such company and the laws of said state;" and the contract refers to the application, and declares that it is issued "in consideration of the application for this policy and of the truth of the several statements made therein." While the contract is based upon the application, yet the latter is only a preliminary instrument, a proposal on the part of the insured, and a stipulation that it shall be controlled by the charter and the laws of the state is not tantamount to a stipulation that the policy issued thereon shall also in like manner be controlled. That such language was incorporated into the application is not strange. Its meaning is clear, and is that no local statute as to the effect of statements or representations or any other matter in the application should in these respects override the provisions of the charter and the laws of New York. In other words, if by the charter or the laws of New York any statement in an application is to be taken as a warranty, no local statute declaring that all statements in an application are to be taken as simply representations shall override the terms of the charter and the New York law. But that is very different from a provision that the contract issued upon such application should also be in all its respects controlled by the laws of New York.

Further, it may be noticed that even if the language justifies a broader construction it may well mean that only such laws of the state of New York as are intended to and do change the charters of the companies, or are intended to have extraterritorial application, should be considered a part of the policy.

The stipulation in this policy is different from that presented to the court of appeals of New York in *Baxter v. Brooklyn L. Ins. Co.*, 119 N. Y. 450, 454, 23 N. E. 1048, 1049 (7 L. R. A. 293), which was that it was "a contract made and to be executed in the state of New York, and construed only according to the laws of that state." There was

a direct provision in respect to the contract itself, and thus incorporated those laws into its terms.

While authorities on this particular question are not numerous, we may properly refer to an opinion of the supreme court of Washington, the state in which this action was brought (*Griesemer v. Mutual L. Ins. Co.*, 10 Wash. 202, 211, 38 Pac. 1031, 1034) in which, referring to this special question, and the contention that this very statute of the state of New York became a part of the contract of the company in the state of Washington, the court said, on 10 Wash. 206, 207, 38 Pac. 1031:

"It is claimed on the part of the plaintiff that upon its enactment it became attached to the defendant, it being a corporation organized under the laws of New York, and effected a change in its charter; so that every policy thereafter issued by it, whether in the state of New York or elsewhere, became subject to its provisions. On the other hand, it is claimed by the defendant that it only affected policies issued to, or held by, residents of the state of New York; that the evident object of its enactment was to protect such residents; that to give it a broader effect would be to convict the legislature of having discriminated against life insurance companies organized under the laws of the state.

"We are unable to construe the law in accordance with the contention of either party. The construction contended for by the defendant is too narrow. The language used is, that 'no life insurance company doing business in the state of New York shall have power to declare forfeited or lapsed any policy. * * *' This language, construed in its ordinary sense, seems to preclude such a narrow construction. Beside, if it were warranted by the language, it would not be reasonable to suppose that the legislature intended to so limit the effect of the statute. If it had so intended, it would have made use of language which in some manner confined the rights to be affected by the statute to residents of the state, instead of to companies doing business therein. While the construction contended for by the plaintiff seems to be equally untenable, for the reason that it would convict the legislature of having sought to accomplish something not in its power. So construed the act would apply to all policies of any company which should do business in the state of New York, wherever issued, regardless of the question as to whether or not it was organized under its laws. That the legislature of New York could not control companies not organized under its laws as to their business transacted in other states is too clear for argument. Hence the construction contended for by respondent would convict the legislature of having attempted that which it could not do, or of having deliberately discriminated against its own companies.

"In our opinion the reasonable and ordinary construction of the language used in the statute is such as to make it applicable to business done in the state of New York; and that the question as to

whether or not the companies doing such business were organized under its laws, or those of some other state, has no influence upon the question as to whether or not the statute is applicable. This construction is justified by the language used, and will give force to every word, while the other will not do so. And since the well-settled rule as to construction of statutes requires every word to be given force if possible, it follows that the limitations of the act are impressed upon all policies issued in the state of New York by either domestic or foreign companies, and that it has no application to policies not issued therein, even although the companies issuing them were organized under its laws."

The New York cases cited by counsel throw no light on the question. *Baxter v. Brooklyn L. Ins. Co.*, 119 N. Y. 450, 23 N. E. 1048, 7 L. R. A. 293, contained in the contract, as heretofore stated, an express stipulation of the controlling law. In *Carter v. Brooklyn L. Ins. Co.*, 110 N. Y. 15, 17 N. E. 396, the question was as to the significance of the word "renewed" in the section referred to, and it does not appear where the policy was issued. In *Phelan v. Northwestern Mut. L. Ins. Co.*, 113 N. Y. 147, 20 N. E. 827, 10 Am. St. Rep. 441, the statute was held applicable to a foreign insurance company doing business in the state of New York, the notice given was held insufficient, and no question was considered as to the scope of the statute otherwise. *De Frece v. National L. Ins. Co.*, 136 N. Y. 144, 32 N. E. 556, was likewise an action against a foreign insurance company, and involved no question like that before us. *Rae v. National L. Ins. Co.*, 9 C. C. A. 215, 20 U. S. App. 410, 60 Fed. 690, was also an action against a foreign insurance company, and the question was simply as to the sufficiency of the notice.

We conclude, therefore, that the statute of the state of New York does not, under the circumstances presented, control, and that the rights of the parties are measured alone by the terms of the contract. The insured having failed to pay the premium for years before his death, the policy was forfeited. The judgment of the Circuit Court of Appeals will be reversed, and the case remanded to the Circuit Court of the United States for the District of Washington, with instructions to set aside the judgment and overrule the demurrer.

VII. Paid-up Policies and Extended Insurance¹⁷

KNAPP v. HOMŒOPATHIC MUT. LIFE INS. CO.

(Supreme Court of United States, 1888. 117 U. S. 411, 6 Sup. Ct. 807, 29 L. Ed. 960.)

In Error to the Circuit Court of the United States for the District of Massachusetts.

This was an action brought March 19, 1878, by a citizen of Massachusetts against a corporation established by the laws of New York, upon a policy of insurance, by which the company, "in consideration of the representations made to them in the application for this policy, which is hereby made a part of this contract, and of the sum of \$47.40 to them in hand paid by Abby Knapp, wife of Charles L. Knapp, and of the quarterly payment of a like amount on or before the sixteenth days of July, October, January, and April, in every year, during the continuance of this policy," insured the life of the husband, for the sole use of the wife, in the amount of \$5,000 for the term of his natural life, beginning on April 16, 1869, payable at the office of the company in New York to her, if living, in 30 days after notice and proof of his death. The application declared that "neglect to pay the premium on or before the day it becomes due shall and will render the policy null and void, and forfeit all payments made thereon, unless otherwise specially provided for in the policy."

The policy contained the following clause: "This policy of insurance, after two annual premiums shall have been paid thereon, shall not be forfeited or become void by reason of the non-payment of premium; but the party insured shall be entitled to have it continued in force for a period to be determined as follows, to-wit: The net value of the policy when the premium becomes due and is not paid shall be ascertained according to the 'combined experience' or actuaries' rate of mortality, with interest at four per cent. per annum. Four-fifths of such net value shall be considered as a net single premium of temporary insurance, and the term for which it will insure shall be determined according to the age of the party at the time of the lapse of premium and the assumptions of mortality and interest aforesaid; or at his option may receive a paid-up policy for the full amount of premium paid: provided, that unless this policy shall be surrendered and such paid-up policy shall be applied for within ninety days after such non-payment as aforesaid, then this policy shall be void and of no effect."

¹⁷ For discussion of principles, see Vance on Insurance, § 81. See, also, Cooley, Briefs on the Law of Insurance, vol. 3, pp. 2407-2422.

A trial by jury having been duly waived, the circuit court found the following facts: The policy was issued April 14, 1869, in the city of New York, where the husband and wife then lived. It was taken out by the husband, who signed the application in the wife's name as her attorney. It was in the possession of the wife in 1871, and of the husband before and afterwards. The premiums were paid for several years, mostly by the husband, but one or two by the wife. She lived apart from her husband nearly all the time after February, 1872. On January 16, 1874, a premium became due and was not paid. On February 26, 1874, the husband represented to the company that his wife was dead. The company believed the representation to be true, and he surrendered the policy, taking from the company \$260 in money, and a new policy, concerning which the only evidence was that it had been forfeited before his death, which happened September 17, 1874. Very soon after his death, the wife sent to the company for information about the policy, and her agent was told by the company that it was forfeited. A considerable time after this, being advised that she might have some rights under the policy, she gave due notice and proof of loss, and more than 30 days afterwards brought this action to recover the full amount insured. The net value of the policy when the non-payment of the premium occurred, if reckoned in the mode pointed out in the policy, would have been sufficient to continue it in force until after the death of the husband. On these facts, the circuit court ruled, as matter of law, that the policy was forfeited by the neglect to pay the premiums and to call for a paid-up policy, and rendered judgment for the defendant, and allowed a bill of exceptions tendered by the plaintiff.

Mr. Justice GRAY, after stating the case as above reported, delivered the opinion of the court.

The canceling of the policy, in consequence of the husband's fraudulent representation that the wife was dead, had no effect upon her rights. It is not relied on by the defendant, and there is nothing in the case to show that it in any way influenced the conduct of the plaintiff by preventing her from paying the premiums or making the election required by the policy. The contract of insurance, made and to be performed in New York, between a corporation and a citizen of that state, is to be governed by the law of New York. By that law, in respect to the payment of or the neglect to pay premiums, a married woman stands like any other person insured (*Baker v. Union Ins. Co.*, 43 N. Y. 283); and there is no statute which affects this case. The decision, therefore, depends upon the true construction of the non-forfeiture clause in the policy.

The single purpose of this clause is that, after two annual premiums shall have been paid, a failure to pay any subsequent premium shall not have the effect of avoiding the whole insurance, but the assured shall have the right to an insurance for such a sum and such a time as the premiums already paid would equitably cover. The policy does

not declare that it shall continue of itself without any act of the assured. On the contrary, it stipulates that "the party insured shall be entitled to have it continued in force for a period to be determined" by ascertaining, according to certain rules, the net value of the policy at the time of failure to pay a premium, and making the amount of that value, considered as a single premium, the basis for determining the time for which there shall be a temporary insurance for the full amount of the original policy. It then prescribes an alternative by which the party insured, "at his option, may receive a paid-up policy for the full amount of premium paid." In short, the forfeiture of the policy, by a failure to pay any premium after the first two, is not absolute, but qualified; and the party insured is entitled to be insured according to the sum already paid in premiums, either for the full amount of the original policy, so long as that sum would pay for it, or else for the full term of the original policy for such amount as that sum would pay for. Then follows the proviso "that unless this policy shall be surrendered and such paid-up policy shall be applied for within ninety days after such non-payment, as aforesaid, then this policy shall be void and of no effect."

It is contended on behalf of the plaintiff that the words "such paid-up policy" show that this provision refers only to a new insurance determined by the second method,—that is, for the full term of the original policy, and for an amount depending upon the sum already paid in premiums; and that if the assured does not seasonably apply for such an insurance, she still remains insured for the full amount for a time computed according to the sum paid. But the proviso does not say that upon a failure to surrender the original policy, and to apply for a paid-up policy, the original policy shall stand good for a temporary insurance; but that it "shall be void and of no effect." The result of either of the two methods already prescribed for determining the extent of the insurance is a paid-up policy. According to either method there is to be no further payment of premium, nor is the original policy continued in force; but the assured is to have the benefit of the sum already paid in premiums, by being insured, either for the amount of the original policy for a time to be determined, or for the time of the original policy for an amount to be determined. Taking the whole clause together, it is clear that the assured is to have the benefit of that sum in one of two ways, at her election, and that election must be made within a certain time. As that time expired without any election, or any excuse for not making one, the forfeiture became complete under the express provisions of the policy, and the circuit court rightly held that the action could not be maintained. Judgment affirmed.

VIII. Dues and Assessments in Mutual Benefit Societies ¹⁸

SUPREME LODGE KNIGHTS OF PYTHIAS v. WITHERS.

(Supreme Court of United States, 1900. 177 U. S. 260, 20 Sup. Ct. 611, 44 L. Ed. 762.)

In error to the Circuit Court of Appeals for the Fifth Circuit to review a decision affirming a judgment in favor of the plaintiff in an action on a certificate or policy of insurance.

This was an action originally begun in the circuit court of Hale county, Alabama, by Josephine R. Withers, to recover of the defendant the amount of a certain certificate or policy of insurance upon the life of her husband.

The case was removed to the circuit court of the United States for the middle district of Alabama, upon the petition of the defendant and upon the ground that the Supreme Lodge Knights of Pythias was a corporation organized by act of Congress, and hence that the controversy arose under the Constitution and laws of the United States.

The case was submitted to a jury upon an agreed statement of facts, and the court instructed a verdict for the plaintiff in the sum of \$3,000, the amount of the policy, with interest, upon which verdict a judgment was entered for \$3,392.54. The case was taken by writ of error to the circuit court of appeals, which affirmed the judgment. 59 U. S. App. 177, 89 Fed. 160, 32 C. C. A. 182. Whereupon the defendant sued out a writ of error from this court.

The facts, so far as they are material, are stated in the opinion of the court.

Mr. Justice BROWN delivered the opinion of the court.¹⁹

The Supreme Lodge Knights of Pythias is a fraternal and benevolent society, incorporated by an act of Congress of June 29, 1894 (28 Stat. 96, c. 119), as the successor of a former corporation of the same name, organized under an act approved May 5, 1870. The beneficial or insurance branch of the order is known as the endowment rank, which is composed of those numbers of the order who have taken out benefit certificates. Such members are admitted into local subordinate branches known as sections. The members of each section elect their own president and secretary. The endowment rank is governed by a board of control whose officers are a president and secretary, and whose place of business is in Chicago. The endowment rank is governed by a constitution and general laws enacted by the Supreme

¹⁸ For discussion of principles, see Vance on Insurance, §§ 83-84. See, also, Cooley, Briefs on the Law of Insurance, vol. 3, p. 2373.

¹⁹ Part of the opinion is omitted.

Lodge, and by rules and regulations adopted by the board of control and approved by the Supreme Lodge.

On January 1, 1883, Robert W. Withers made application for membership in the endowment rank, and in that application made the following statement: "I hereby agree that I will punctually pay all dues and assessments to which I may become liable, and that I will be governed, and this contract shall be controlled, by all the laws, rules, and regulations of the order governing this rank, now in force, or that may hereafter be enacted, or submit to the penalties therein contained." His application was accepted, and, after receiving a certificate under the first act of incorporation which he voluntarily surrendered, he received the certificate upon which this action is brought. This certificate recited the original application for membership dated January 1, 1883, the surrender of the former certificate and the application for transfer to the fourth class, which were "made a part of this contract, * * * and in consideration of the payment heretofore to the said endowment rank of all monthly payments, as required and the full compliance with all the laws governing this right, now in force or that may hereafter be enacted, and shall be in good standing under said laws, the sum of \$3,000 will be paid by the Supreme Lodge, etc., to Josephine R. Withers, wife, * * * upon due notice and proof of death and good standing in the rank at the time of his death, * * * and it is understood and agreed that any violation of the within-mentioned conditions or other requirements of the laws in force governing this right shall render this certificate and all claims null and void, and the said Supreme Lodge shall not be liable for the above sum or any part thereof."

Withers was a member of section 432, at Greensboro, Alabama, of which one Chadwick was secretary. By the laws of the endowment rank Withers was required to pay \$4.90 monthly in accordance with his age and the amount of his endowment.

In January, 1894, defendant adopted and promulgated the following general laws:

"Sec. 4. Monthly payments and dues of members holding certificates of endowment shall be due and payable to the secretary of section without notice, on the first day of each and every month; and a failure to make such payment on or before the 10th day of each month shall cause, from and after such date, a forfeiture of the certificate of endowment and all right, title, and interest such member or his beneficiaries may have in and to the same, and membership shall cease absolutely. In case of such forfeiture, membership may be regained by making application in the form prescribed for new applicants, the payment of required membership fee and surrender of the forfeited certificate. If approved by the medical examiner-in-chief and accepted by the board of control, a new certificate shall be issued, and the rating shall hereafter be at the age of nearest birthday to the date of the last application."

"Sec. 6. The secretary of the section shall forward to the board of control the monthly payments and dues collected immediately after the 10th day of each and every month.

"If such payment and dues are not received by the board of control on or before the last day of the same month the section so failing to pay, and all members thereof, shall stand suspended from membership in the Endowment Rank; and their certificates and all right, title, and interest therein shall be forfeited. Notice of such suspension shall be forthwith mailed by the secretary of the board of control to the president and secretary of such section.

"Provided, that the section whose membership has forfeited their endowment, and whose warrant has been suspended, shall regain all right as a section, and any surviving members thereof (not less than five) shall regain full rights and privileges held previous to such forfeiture, if within thirty days from suspension of warrant said section shall pay to the board of control the amount of all monthly payments, assessments, and dues accrued upon said members.

"Sec. 10. Sections of Endowment Ranks shall be responsible and liable to the board of control for all moneys collected by the secretary or other officers from the members for monthly payments, assessments, or dues not paid over to the board within the time and manner prescribed by law. Officers of sections are the agents of members, and shall in no wise be considered as the agents of the representatives of the board of control or of the Endowment Rank or of the Supreme Lodge."

For over twelve years Withers made his monthly payments as required by law to the secretary of the section, and the money was regularly remitted to the board of control at Chicago. His last payment was made prior to October 10, 1895, as required by section 4, for the dues of that month. As there were a large number of members in the section, and as their dues were not all collected until the latter part of the month, the secretary of the section did not send the money to the board of control until October 31, when he mailed to the secretary of that board a check covering all the amounts due by all the members of the section for that month. The letter did not leave the post-office until the next day, and was received by the board of control November 4. No notice was ever mailed by the board of control to Withers notifying him of his suspension; but on November 1, as required by section 6, the secretary of the board of control mailed to Mr. Chadwick, the secretary of the section at Greensboro, a notice of the suspension of all members thereof, with an intimation that the members of the section might regain their rights under certain conditions therein named. No notice was mailed to the president of the section. In view of the technical character of the defense, it is worthy of mention that the board of control did not strictly comply with its own regulation in this particular.

Upon receiving the remittance, and on November 4, the secretary of the board of control mailed the following postal card to the secretary of the section:

“Office Board of Control,

“Chicago, November 4, 1895.

“Received of Section No. 432 one hundred and thirteen 30-100 dollars in payment of monthly payments and dues for October, 1895, on condition that all members for whom above payment is made were living at date of this receipt.

H. B. Stolte,

“Secretary Board of Control.”

The insured was suddenly taken ill and died of an attack of cholera morbus on November 1, 1895. Proofs of death were waived by the defendant, which, however, refused to pay the amount of the certificate.

It is hardly necessary to say that the defense in this case is an extremely technical one, and does not commend itself to the average sense of justice. It ought to be made out with literal exactness. It is admitted that Withers for twelve years paid all his dues promptly to the secretary of the section as required by section 4 of the general laws, and that the failure of the board of control to receive them on or before the last day of the month was the fault of the secretary, and not of the insured. The whole defense rests upon the final clause of section 10, declaring that “officers of sections are the agents of the members and shall in no wise be considered as the agents of the representatives of the board of control of the Endowment Rank or of the Supreme Lodge.” It appears to have been the habit of the secretary, Mr. Chadwick, not to remit each payment as it was made, but to allow all the dues of each month to collect in his hands and to remit them together by a check covering the whole amount, about the close of the month. In this connection he makes the following statement: “It had never been the custom of my office for me to send the money off by the twentieth of the month” (although section 6 required him to forward it immediately after the tenth). “I usually sent the money off about the last days of the month. For the previous year I had mailed to the secretary of the board of control the dues of the section as follows: October 27, 1894, November 28, 1894, December 29, 1894, January 29, 1895, February 27, 1895, March 30, 1895, April 29, 1895, June 29, 1895, July 8, 1895, August 29, 1895, September 28, 1895, October 28, 1895, October 31, 1895—all of which sums were accepted by the board of control.”

The position now taken by the defendant, that in receiving the money from the insured members, and remitting the same to the board of control, the secretary of the section was the agent of the insured, and not of the board of control, is inconsistent with the requirement of section 4, which makes it obligatory upon policy holders to pay their monthly dues to the secretary of the section, and to him only, as well

as with the provision of section 10, that "sections of Endowment Rank shall be responsible and liable to the board of control for all moneys collected by the secretary, or other officers, from the members for monthly payments, assessments, or dues not paid over to the board within the time and manner prescribed by law." The question at once suggests itself, To whom does the money belong when paid to the secretary of the section? If to the insured, it was within his power to reclaim it at any time before it was remitted. If to the board of control, it was the duty of the secretary of the section to remit it. Why, too, should the board of control attempt to deal with it at all beyond requiring it to be paid them by a certain day? Section 10 is a complete answer since that makes the sections responsible to the board of control from the moment the money is collected, and section 6 makes it the duty of the secretary to remit it at once.

There seems to have been an attempt on the part of the defendant to invest Mr. Chadwick with the power and authority of an agent, and at the same time to repudiate his agency. But the refusal to acknowledge him as agent does not make him the less so, if the principal assume to control his conduct. It is as if a creditor should instruct his debtor to pay his claim to a third person, and at the same time declare that such third person was not his agent to receive the money. It would scarcely be contended, however, that such payment would not be a good discharge of the debt, though the third person never accounted to the creditor; much less, that it would not be a good payment as of a certain day, though the remittance, through the fault of the person receiving it, did not reach the creditor until the following day.

The position of the secretary must be determined by his actual power and authority, and not by the name which the defendant chooses to give him. To invest him with the duties of an agent, and to deny his agency, is a mere juggling with words. Defendant cannot thus play fast and loose with its own subordinates. Upon its theory the policy holders had absolutely no protection. They were bound to make their monthly payments to the secretary of the section, who was bound to remit them to the board of control; but they could not compel him to remit, and were thus completely at his mercy. If he chose to play into the hands of the company, it was possible for him, by delaying his remittance until after the end of the month, to cause a suspension of every certificate within his jurisdiction; and in case such remittance was not made within thirty days from such suspension (section 6) apparently to make it necessary under section 4 for each policy holder to regain his membership by making a new application, surrendering his forfeited certificate, making payment of the required membership fee, undergoing a new medical examination, and paying a premium determined by his age at the date of the last application. In other words, by the failure of the secretary, over whom he had no control, to remit within thirty days, every member of the section might lose his rights

under his certificate and stand in the position of one making a new application, with a forfeiture of all premiums previously paid. The new certificate would, of course, be refused if his health in the meantime had deteriorated, and the examining physician refused to approve his application. This would enable the company at its will to relieve itself of the burdens of undesirable risks by refusing certificates of membership to all whose health had become impaired since the original certificate was taken out, though such certificate-holder may have been personally prompt in making his monthly payments.

It could not thus clothe the secretaries of the sections with the powers of agents by authorizing them to receive monthly payments and instructing them to account for and remit them to the Supreme Lodge at Chicago, and in the same breath deny that they were agents at all. The very definition of an agent, given by Bouvier, as "one who undertakes to transact some business, or manage some affair, for another, by the authority and on account of the latter, and to render an account of it" presupposes that the acts done by the agent shall be done in the interest of the principal, and that he shall receive his instructions from him. In this case the agent received his instructions from the Supreme Lodge, and his actions were, at least, as much for the convenience of the lodge as for that of the insured. If the Supreme Lodge intrusted Chadwick with a certain authority, it stands in no position to deny that he was its agent within the scope of that authority.

The reports are by no means barren of cases turning upon the proper construction of this so-called "agency clause," under which the defendant seeks to shift its responsibility upon the insured for the neglect of Chadwick to remit on the proper day. In some jurisdictions it is held to be practically void and of no effect; in others, it is looked upon as a species of wild animal, lying in wait and ready to spring upon the unwary policy holder, and in all, it is eyed with suspicion and construed with great strictness. We think it should not be given effect when manifestly contrary to the facts of the case, or opposed to the interests of justice. Wherever the agency clause is inconsistent with the other clauses of the policy, conferring power and authority upon the agent, he is treated as the agent of the company rather than of the policy holder. The object of the clause in most cases is to transfer the responsibility for his acts from the party to whom it properly belongs, to one who generally has no knowledge of its existence. It is usually introduced into policies in connection with the application, and for the purpose of making the agent of the company the agent of the party making the application, with respect to the statements therein contained. * * *

In *Patridge v. Commercial F. Ins. Co.*, 17 Hun (N. Y.) 95, it was said of the agency clause: "This is a provision which deserves the condemnation of courts, whenever it is relied upon to work out a fraud, as it is in this case. The policy might as well say that the president

of the company should be deemed the president of the assured.
 * * * Such a clause is no part of a contract. It is an attempt to reverse the law of agency, and to declare that a party is not bound by his agent's acts. Whether one is an agent of another is a question of mixed law and fact, depending on the authority given expressly or impliedly. And when a contract is, in fact, made through the agent of a party, the acts of that agent in that respect are binding on his principal." * * *

Speaking of the agency clause in *Continental Ins. Co. v. Pearce*, 39 Kan. 396, 18 Pac. 291, 7 Am. St. Rep. 557, it is said: "This is but a form of words to attempt to create on paper an agency which in fact never existed. It is an attempt of the company not to restrict the powers of its own agent, but an effort to do away with that relation altogether by mere words, and to make him in the same manner the agent of the assured, when, in fact, such relation never existed.

* * * We do not believe the entire nature and order of this well-established relation can be so completely subverted by this ingenious device of words. The real fact, as it existed, cannot be hidden in this manner; much less can it be destroyed and something that did not in reality exist be placed in its stead. The substance is superior to the mere drapery of words with which one party wishes to bring into existence and clothe an unreal authority." See also *Kausal v. Minnesota Farmers' Mut. F. Ins. Asso.*, 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776, in which the act of an insurance agent in making out an incorrect application was held chargeable to the insurer, and not to the insured, notwithstanding the insertion of an agency clause in the policy.

In *Planters' Ins. Co. v. Myers*, 55 Miss. 479, 30 Am. Rep. 521, an agency clause in a policy of insurance was held to be void, as involving a legal contradiction. The applicant made truthful answers to certain interrogatories propounded by the agent, who stated certain things that were not true. They were held not to be binding upon the insured. * * *

The case of *Schunck v. Gegenseitiger Wittwen und Waisen Fond*, 44 Wis. 369, is almost precisely like the instant case. The constitution of the defendant corporation, whose governing body or directory was elected by the several "groves" (corresponding to the sections in this case) of the United Ancient Order of Druids, declared that every member whose assessment was not paid by his grove to the directory within thirty days after demand made forfeited his claim to have a certain sum in the nature of life insurance paid to his widow, or heirs, after his death. It was held that, in view of all the provisions of such constitution, the benevolent object of the corporation, and the fact that the several groves are, at least, as much its agents to collect and pay over the dues of their members, as they are agents of the latter, in case of a member whose dues have been fully paid to his grove at the time of his death, the amount of insurance might be recovered, not-

withstanding a default of the grove in paying over such dues to the defendant.

The agency clause was also once before this court in the case of *Grace v. American C. Ins. Co.*, 109 U. S. 278, 27 L. Ed. 932, 3 Sup. Ct. 207, in which a clause in the policy that the person procuring the insurance to be taken should be deemed the agent of the assured and not of the company, was held to import nothing more than that the person obtaining the insurance was to be deemed the agent of the insured in the matters immediately connected with the procurement of the policy, and that, where his employment did not extend beyond the procurement of the insurance, his agency ceased upon the execution of the policy, and subsequent notice to him of its termination by the company was not notice to the insured.

In the following cases the officers of the subordinate lodge, or conclave, were treated as the agents of the Supreme Conclave in the matter of granting extensions of time for the payment of assessments: *Whiteside v. Supreme Conclave I. O. of H. (C. C.)* 82 Fed. 275; *Knights of Pythias of the World v. Bridges*, 15 Tex. Civ. App. 196, 39 S. W. 333.

In the case under consideration it may be immaterial, except as bearing upon the equities of the case, that the agency clause was introduced into the general laws of the order in January, 1894, eleven years after the first certificate was issued to the assured, and nearly nine years after the certificate was issued upon which suit was brought. There is no evidence that it was ever called to Withers' attention, or that he had actual knowledge of it. If he were bound at all, it could only be by the stipulation in his original application, and by the terms of his certificate that "he would be bound by the rules and regulations of the order, now in force or that may hereafter be enacted." All that is required of him is a full compliance with such laws, and there is not the slightest evidence that he failed personally in any particular to comply with any laws of the order, present or future. The only failure was that of the secretary of the section, who, to say the least, was as much the agent of the order as he was of Withers, although the latter is sought to be charged with his dereliction by a clause inserted in the general laws, long after the certificate was issued. The decisive consideration is this: Chadwick was the agent of the defendant, and of the defendant only, after the receipt of the money from Withers. Under section 10 he then became responsible for it to the board of control. In rendering his monthly accounts and paying over the money he acted solely for the defendant. From the time he paid the money to Chadwick the insured had no control over him, and was not interested in its disposition. Unless we are to hold the insured responsible for a default of this agent, which he could not possibly prevent, we are bound to say that his payment to this agent discharged his full obligation to the defendant. That it should have the power

of declaring that the default of Chadwick, by so much as one day (and it did not exceed four days in this case), to pay over this money, should cause a forfeiture of every certificate within his jurisdiction, is a practical injustice too gross to be tolerated. * * *

The judgments of the Circuit Court and of the Court of Appeals were right, and they are therefore affirmed.²⁰

²⁰ Effect of subsequent by-laws changing rate of assessment, see *Reynolds v. Supreme Council Royal Arcanum*, ante, p. 132.

THE CONSENT OF THE PARTIES—CONCEALMENT**I. What must be Disclosed ¹**

**PENN MUT. LIFE INS. CO. v. MECHANICS' SAVINGS
BANK & TRUST CO.**

(Circuit Court of Appeals of United States, Sixth Circuit, 1896. 72 Fed. 413,
19 C. C. A. 286, 38 L. R. A. 33.)

In Error to the Circuit Court of the United States for the Middle District of Tennessee.

This action was on a policy of insurance for \$10,000 issued December 2, 1892, by the Penn Mutual Life Insurance Company to John Schardt, on his own life. Schardt died April 17, 1893, during the currency of the policy. Just before his death he had assigned the policy to the Mechanics' Savings Bank of Nashville, to secure a large debt owed by him to the bank. Since his death the bank has made a general assignment for the benefit of creditors to J. J. Pryor, for whose benefit, as assignee, this suit was brought. The trial resulted in a judgment for the full amount of the policy and interest, in favor of the plaintiff below, and the insurance company brings the judgment here for review on writ of error.

Schardt's salary as teller was \$1,500, and he had but a small amount of property. When he died in April, 1893, he had \$80,000 of insurance on his life, nearly all of which had been written within six months. It was conceded that, for more than a year prior to his death, Schardt had been constantly embezzling the funds of his bank, and that his indebtedness to the bank thus criminally incurred amounted at the time of the application for this policy to little less than \$100,000, and at his death exceeded that sum. He did not disclose the fact of his crime to the defendant at the time of his application, or at any other time. His death in April, 1893, was caused by congestion of the brain and other vital organs, caused by the mental strain which a disclosure of his crime brought on.

The defendant requested the court to instruct the jury to bring in a verdict for the defendant because it appeared by the undisputed evidence that Schardt's warranties of the truth of certain representations in regard to facts material as a matter of law had been broken, and the policy avoided. Defendant asked the same instruction on the ground that Schardt had concealed from it and its

¹ For discussion of principles, see Vance on Insurance, §§ 90-92. See, also, Cooley, Briefs on the Law of Insurance, vol. 2, p. 1203; vol. 3, p. 2007.

agents the fact that he was an embezzler in the sum of \$100,000,—a fact claimed to be material to the risk, as a matter of law. These requests were refused by the trial court.

Before TAFT and LURTON, Circuit Judges, and HAMMOND, District Judge.

TAFT, Circuit Judge.² * * * The trial court held, against the objection of defendant, that, when Schardt was asked what his occupation was, he answered truly that he was a bank teller, and that the scope of the question was not such as to require him to add that he was an habitual embezzler. We concur in this view. Neither the company nor Schardt could have thus understood the question. The embezzling was merely misfeasance in his position as teller. He was an unfaithful bank teller. But nothing in the question called upon him to say whether he was a good or bad bank teller. In *New York Bowery Fire Ins. Co. v. New York Fire Ins. Co.*, 17 Wend. (N. Y.) 359, the issue was whether a contract of reinsurance was avoided by the failure of the company seeking reinsurance to communicate to the reinsurer facts known to it reflecting on the character of the original insured. The supreme court of New York held that it was, but in doing so expressed, through Justice Bronson, its opinion of what the duty of the original insured was in this regard. * * *

Justice Bronson's discussion related to the disclosure of a fact not inquired about, and the rule there laid down was, of course, not intended to relieve an applicant from answering questions put to him, which, in their necessary scope, require statements from him which relate to his moral character. Nevertheless the reasoning of the court justifies the conclusion that the insured is not called upon to construe a simple question concerning his ordinary vocation into one calling for a statement of crimes or misfeasances of which he may have been guilty in pursuing such vocation. Then it is said that he had expressly warranted that, in his statements and answers in this application, no circumstances or information had been withheld touching his past and present state of health and habits of life, with which the Penn Mutual Life Insurance Company ought to be made acquainted, and that his habit of embezzling should have been communicated, to comply with that warranty. We are of opinion that these words refer to questions and answers in the application, and are equivalent to a warranty that the answers to the questions are full and complete. The habits of life referred to are those inquired about in the medical examination, and are those which have a direct relation to physical health, and could not be construed to refer to thefts or embezzlements of which the applicant may have been guilty, and concerning which no inquiry was made.

² Part of the opinion is omitted and the statement of facts is rewritten.

But, even if Schardt was not required by any specific question to disclose the fact of his embezzlements, the policy would still be avoided, if it were material to the risk, and he intentionally concealed it from the company. This is not controverted. The issue of law between the parties is whether the policy would not be avoided, even if his failure to disclose it were due, not to fraudulent intent, but to mere inadvertence, or a belief that it was not material. It is insisted for the plaintiff in error that the motive or cause of the nondisclosure is unimportant, if the fact be found material to the risk, and was known to the insured when he obtained the insurance. The trial court took the other view, and instructed the jury accordingly. If this were a case of marine insurance, the contention for the plaintiff in error must certainly be sustained.

The great and leading case on the subject is that of *Carter v. Boehm*, 3 Burrows, 1905, where Lord Mansfield explained the effect of concealment of material facts in insurance to avoid the policy. He said: "Insurance is a contract upon speculation. The special facts upon which the contingent chance is to be computed lie most commonly in the knowledge of the insured only. The underwriter trusts to his representations, and proceeds upon confidence that he does not keep back any circumstance in his knowledge to mislead the underwriter into a belief that the circumstance does not exist, and to induce him to estimate the risk as if it did not exist. The keeping back such a circumstance is a fraud, and therefore the policy is void. Although the suppression should happen through mistake, without any fraudulent intention, yet still the underwriter is deceived, and the policy is void, because the risk run is really different from the risk understood and intended to be run at the time of the agreement."

Carter v. Boehm was the case of insurance of a fort and warehouse in the East Indies against capture by the enemy; and, although not strictly a case of marine insurance, it has usually been treated as such, because of the resemblance of the risk, in its speculative character, to that of a merchant vessel in time of war. That it states the rule enforced by the courts of this country in cases of marine insurance is established by many decisions. Perhaps the one most recently considered by the supreme court of the United States was a case of reinsurance of a marine risk. *Sun Mut. Ins. Co. v. Ocean Ins. Co.*, 107 U. S. 485, 1 Sup. Ct. 582, 27 L. Ed. 337.

The very marked difference between the situation of the parties in marine insurance and that of parties to a fire or life policy has led many courts of this country to modify the rigor of the doctrine in its application to fire and life insurance, and to lean towards the view that no failure to disclose a fact material to the risk, not inquired about, will avoid the policy, unless such nondisclosure was with intent to conceal from the insurer a fact believed to be material; that is, unless the nondisclosure was fraudulent. In marine insur-

ance the risk was usually tendered and accepted when the vessel was on the high seas, where the insurer had no opportunity to examine her, or to know the particular circumstances of danger to which she might be exposed. The risk in such a case is highly speculative, and it is manifestly the duty of the insured to advise the insurer of every circumstance within his knowledge from which the probability of a loss can be inferred, and he cannot be permitted to escape the obligation by a plea of inadvertence or negligence. In cases of fire and life insurance, however, the parties stand much more nearly on an equality. The subject of the fire insurance is usually where the insurer can send its agents to give it a thorough examination, and determine the extent to which it is exposed to danger of fire from surrounding buildings, or because of the plan or material of its own structure. The subject of life insurance is always present for physical examination by medical experts of the insurer, who often acquire, by lung and heart tests, and by chemical analysis of bodily excretions, a more intimate knowledge of the bodily condition of the applicant than he has himself.

Then, too, the practice has grown of requiring the applicant for both fire and life insurance to answer a great many questions carefully adapted to elicit facts which the insurer deems of importance in estimating the risk. In life insurance, not only is the applicant required to answer many general questions concerning himself and his ancestors, but he is also subjected to an extended examination concerning his bodily history. This was true in the case at bar. When the applicant has fully and truthfully answered all these questions, he may rightfully assume that the range of the examination has covered all matters within ordinary human experience deemed material by the insurer, and that he is not required to rack his memory for circumstances of possible materiality, not inquired about, and to volunteer them. He can only be said to fail in his duty to the insurer when he withholds from him some fact which, though not made the subject of inquiry, he nevertheless believes to be material to the risk, and actually is so, for fear it would induce a rejection of the risk, or, what is the same thing, with fraudulent intent.

A strong reason why the rule as to concealment should not be so stringent in cases of life insurance as in marine insurance is that the question of concealment rarely, if ever, arises until after the death of the applicant, and then the mouth of him whose silence and whose knowledge it is claimed avoid the policy is closed. The application is generally prepared, and the questions are generally answered, under the supervision of an eager life insurance solicitor. Only the barest outlines of the conversations between the applicant and the solicitor are reduced to writing. The applicant is likely to trust the judgment of the solicitor as to the materiality of everything not made the subject of express inquiry, and, with the solicitor's

strong motive for securing the business, there is danger that facts communicated to him may not find their way into the application. With respect to a contract thus made, it is clearly just to require that nothing but a fraudulent nondisclosure shall avoid the policy.

Nor does this rule result in practical hardship to the insurer, for in every case where the undisclosed fact is palpably material to the risk the mere nondisclosure is itself strong evidence of a fraudulent intent. Thus, if a man, about to fight a duel, should obtain life insurance without disclosing his intention, it would seem that no argument or additional evidence would be needed to show the fraudulent character of the nondisclosure. On the other hand, where men may reasonably differ as to the materiality of a fact concerning which the insurer might have elicited full information, and did not do so, the insurer occupies no such position of disadvantage in judging of the risk as to make it unjust to require that before the policy is avoided it shall appear, not only that the undisclosed fact was material, but also that it was withheld in bad faith. To hold that good faith is immaterial in such a case is to apply the harsh and rigorous rule of marine insurance to a class of insurance contracts differing so materially from marine policies in the circumstances under which the contracting parties agree that the reason for the rule ceases. The authorities are not uniform, and we are able to take that view which is more clearly founded in reason and justice. In England, the tendency of the courts has been to hold that the same rules apply to fire and life insurance as to marine insurance, in reference to the effect of the concealment of material facts. * * *

Coming now to the American authorities, we find very early in reported cases a disposition to depart from the strict rules of marine insurance law in the consideration of fire and life policies. In *Loan Co. v. Snyder*, 16 Wend. 481, 30 Am. Dec. 118, Chancellor Walworth, delivering the opinion of the supreme court of errors of New York, refers to the peculiar rule of construction applied to that "anomalous and informal instrument called a 'marine policy,'" and expresses the opinion that it is not to be applied in its strictness to fire policies. The same view is expressed in *Jolly's Adm'r's v. Baltimore Equitable Soc.*, 1 Har. & G. 295, 18 Am. Dec. 288, by the court of appeals of Maryland.

In *Burritt v. Insurance Co.*, 5 Hill, 188, 192 (40 Am. Dec. 345), Bronson, J., speaking for the supreme court of New York, after referring to the rule by which nondisclosure of material facts avoids a marine policy, although no inquiry be made, and although it is the result of innocent mistake or inadvertence, said: "But this doctrine cannot be applicable—at least, not in its full extent—to policies against fire. If a man is content to insure my house without taking the trouble to inquire of what materials it is constructed, how it is situated in reference to other buildings, or to what uses it is applied, he has no ground for complaint that the hazard proves to

be greater than he had anticipated, unless I am chargeable with some misrepresentation concerning the nature or extent of the risk. It is therefore the practice of companies which insure against fire to make inquiries of the assured, in some form, concerning all such matters as are deemed material to the risk, or which may affect the amount of premium to be paid. This is sometimes done by the conditions of insurance annexed to the policy, and sometimes by requiring the applicant to state particular facts in a written application for insurance. When thus called upon to speak, he is bound to make a true and full representation concerning all the matters brought to his notice, and any concealment will have the like effect as in the case of a marine risk."

The use of "concealment," in this last passage, should be remarked. It means there a failure fully to answer a question put.

* * * It is not a mere silence upon a matter not made the subject of inquiry. It is necessary to determine in which sense the word is used in decided cases, before their bearing on the present question can be clearly understood. Here we are considering only the duty of the insured in respect to something not inquired about. The supreme court of the United States, in *Clark v. Insurance Co.*, 8 How. 235, 249, 12 L. Ed. 1061, suggests a distinction between fire and marine insurance, in reference to the obligation of the insured to speak when not inquired of, and cites in support of it the Maryland and New York cases just referred to. * * *

In *Insurance Co. v. Harmer*, 2 Ohio St. 452, 59 Am. Dec. 684, which was a fire insurance case, the defense was made that, previous to the issuing of the policy, there had been a fire in the insured premises, which had not been disclosed to the insurer. The court charged the jury that, if they found the circumstance to be material to the risk, the policy was void, "whether concealment resulted from fraud, accident, or mistake." Judge Ranney—one of Ohio's greatest judges—presided at the circuit in this cause, and delivered the opinion of the supreme court. In the supreme court he expressed the view that he was in error in his charge, in thus enforcing the rule of marine insurance in a fire insurance case. Such an expression of opinion was not necessary to the conclusion in the case, but the high standing of the judge gives great weight to even his obiter dictum. He said: "It is not now true, whatever may be thought of the older authorities, that there is no difference in this respect [i. e. as to the rule of concealment] between marine and fire insurance, nor that a failure to disclose every fact material to the risk, upon which information is not asked for, or suppressed with a fraudulent intent, will avoid a policy of the latter description. The reason of the rule, and the policy in which it was founded, in its application to marine risks, entirely fail when applied to fire policies. In the former the subject of insurance is generally beyond the reach, and not open to the inspection, of the underwriter, often

in distant ports or upon the high seas, and the peculiar perils to which it may be exposed, too numerous to be anticipated or inquired about, known only to the owners and those in their employ; while in the latter it is, or may be, seen and inspected before the risk is assumed, and its construction, situation, and ordinary hazards as well appreciated by the underwriter as the owner. In marine insurance the underwriter, from the very necessities of his undertaking, is obliged to rely upon the assured, and has therefore the right to exact a full disclosure of all the facts known to him which may in any way affect the risk to be assumed. But in fire insurance no such necessity for reliance exists, and, if the underwriter assumes the risk without taking the trouble to either examine or inquire, he cannot very well, in the absence of all fraud, complain that it turns out to be greater than he anticipated. And so are the latest and best authorities." * * *

The number of life insurance cases in which the question has arisen is small. In *Rawls v. Insurance Co.*, 27 N. Y. 287, 84 Am. Dec. 280, the court of appeals held that, where an applicant for life insurance fully and truly answered all questions put to him by the company, the mere omission to state matter, though material to the risk, would not be a concealment, and would not affect the validity of the policy, because the applicant might presume that the insurer had questioned him on all subjects which he deemed material. In *Malloy v. Insurance Co.*, 47 N. Y. 52, 57, 7 Am. Rep. 410, the same court sustained a charge to the jury, that, if the applicant did not conceal any fact which, in his own mind, was material in making the application, the policy was not void. See, also, *Cheever v. Insurance Co.*, 4 Am. Law Rec. 155.

In *Vose v. Insurance Co.*, 6 Cush. (Mass.) 42, the supreme judicial court of Massachusetts announced the principle, as applicable to life policies, that the concealment of a material fact will avoid the policy, though it is the result of accident or negligence, and not of design. The case did not call for the application of such a principle. The applicant was asked if he was afflicted with any disease. He answered that he was not. At the time he had consumption, and had experienced several of the premonitory symptoms. His answers were made the basis of the policy. It is probable that the term "concealment," as used in this case, refers to an incomplete answer to a general question, rather than a failure to volunteer a fact not asked for, because the court uses in the opinion language which is incorporated in the headnote as follows: "It is the duty of the insured to disclose all material facts within his knowledge. Although specific questions, applicable to all men, are proposed by the insurers, yet there may be particular circumstances affecting the individual to be insured, which are not likely to be known to the insurers; and the concealment of a material fact, when a general question is put by the insurers, at the time of effecting the policy, which would elicit that fact, will vitiate the policy."

But, whatever the effect of this case, we think the modern tendency, even of Massachusetts decisions, is to require that a non-disclosure of a fact not inquired about shall be fraudulent, before vitiating the policy; and, as already stated, this view is founded on the better reason. The subject is by no means as clear, upon the authorities, as could be wished, and the text writers find much difficulty in reconciling the cases. May, Ins. (3d. Ed.) §§ 202, 203, 207. We hold that the charge of the circuit court upon this question was correct. * * * Reversed.³

II. When Facts Concealed are to be Deemed Material ⁴

MASCOTT v. FIRST NAT. FIRE INS. CO.

(Supreme Court of Vermont, 1896. 69 Vt. 116, 37 Atl. 255.)

Assumpsit by Fred E. Mascott and wife against the First National Fire Insurance Company on a fire insurance policy. At the close of the testimony defendant moved for a verdict, and, the motion being denied, did not desire to go to the jury on any issue of fact. The court then directed a verdict, and rendered judgment thereon, for plaintiff, and defendant excepts.

START, J.⁵ The action is assumpsit upon a fire insurance contract, by which the plaintiffs were insured in the sum of \$960 on their two-story frame building, occupied for a storehouse and paint shop. The policy contained the following provision: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance, or the subject thereof; or if the interest of the insured in the property be not truly stated herein." * * *

The clause in the policy against concealment and misrepresentation provides that the entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning the insurance, or the subject thereof; or if the interest of the insured in the property be not truly stated therein. There was a mortgage of \$200 on the property, and this fact was not represented to the defendant at the time the policy was issued; and it is insisted by the defendant that this was a concealment of a material fact. The evidence tended to show that the property was worth \$2,500. It did not appear on trial in the court below that any written application for the policy was made by the

³ The judgment was reversed on the ground of error in the exclusion of certain evidence.

⁴ For discussion of principles, see Vance on Insurance, §§ 93, 94.

⁵ Part of the opinion is omitted.

insured, nor that the agent of the company made any inquiry as to incumbrance.

The terms of the condition relied upon by the defendant are not those which would naturally direct the attention of the insured to the necessity of disclosing incumbrances upon the property, or suggest that they were material to the risk. A concealment of a fact not material would not avoid the policy. The question of whether the policy shall be void by reason of concealment or misrepresentation is, by the terms of the policy, made to depend upon their materiality. The fact that there is a mortgage for \$200 would not seem to be material in effecting an insurance for \$960. The defendant did not desire to go to the jury upon the question of whether such concealment was material, and we cannot, in view of the holding of the court below, assume that it was. As neither party desired to go to the jury on any issue of fact, it was for the court to direct a verdict on such a state of facts as it regarded proved by the evidence, and the verdict will be upheld if there is any evidence to sustain it. *Robinson v. Larabee*, 58 Vt. 652, 5 Atl. 512.

The evidence tended to show that, if there was concealment or misrepresentation, it was not material. The insured were the owners of the property, notwithstanding there was a small mortgage thereon; and under the findings of the court below it must be held that there was no material misrepresentation or concealment respecting such ownership by reason of the undisclosed mortgage. If the company had intended that the policy should be void if the insured omitted to mention incumbrances, it could have made that intention clear by inserting the word "incumbered," instead of leaving it for the insured to conjecture respecting the materiality of facts and circumstances. The insured might well regard the existence of a small mortgage upon their property an immaterial fact, inasmuch as their attention was not directed to the subject of incumbrance by the defendant's agent or by the policy.

A misrepresentation in insurance is a statement of something as a fact which is untrue, and which the insured states knowing it to be untrue, or which he states positively as true without knowing it to be true, with intent to deceive, and which has a tendency to mislead, such fact in either case being material; and the materiality of a representation or concealment is a question for the jury. *Daniels v. Insurance Co.*, 12 Cush. (Mass.) 416, 59 Am. Dec. 192; *Clark v. Insurance Co.*, 40 N. H. 333, 77 Am. Dec. 721. Concealment, according to the law of insurance, is a designed and intentional withholding of any fact material to the risk which the assured ought in honesty and good faith to communicate; and any fact is material, the knowledge or ignorance of which would materially influence the insurer in making the contract at all, or in estimating the degree and character of the risk, or in fixing the rate of insurance. *Clark v. Insurance Co.*, *supra*. * * * Affirmed.

THE CONSENT OF THE PARTIES—REPRESENTATIONS AND WARRANTIES

I. The Nature and Effect of Representations ¹

FREEDMAN v. FIRE ASS'N OF PHILADELPHIA.

(Supreme Court of Pennsylvania, 1895. 168 Pa. 249, 32 Atl. 39.)

Action by R. Freedman against the Fire Association of Philadelphia. Judgment for plaintiff. Defendant appeals.

FELL, J.² The policy of insurance upon which suit was brought was upon a stock of general merchandise in a country store. It was insured as the property of R. Freedman. It was owned by Rosa Freedman, a married woman, and was in charge of her brother-in-law, Louis Freedman, who conducted the business at the store. She resided with her husband, some 50 miles distant from the place where the business was carried on, and gave it no supervision whatever. The evidence at the trial was uncontradicted that the insurance had been procured by her agent on the representation made to the agent of the insurance company that "R. Freedman was a successful business man," and that the policy was issued under the belief based upon representations made that the company was insuring a stock of goods owned by a business man, who was personally conducting the business, and that the risk would not have been accepted had the truth been known. It was also undisputed that the agents of the company had no knowledge that the representations were incorrect until after the loss.

The jury was instructed that, if the defendant accepted the risk because of these representations, and would not otherwise have done so, the policy was void because of the fraud practiced. It was clearly an imposition upon the company to procure a policy upon the representation that the property insured was owned by and in charge of a successful business man, when in fact the title was in a married woman, who exercised no supervision over it. The actual business risk because of the want of personal supervision by the owner and the moral risk were both greater. Whether greater or less, they were different. It was important to the company to know whose

¹ For discussion of principles, see Vance on Insurance, §§ 98, 99. See, also, Cooley, Briefs on the Law of Insurance, vol. 2, pp. 1120, 1232; vol. 3, pp. 1926, 2023.

² Part of the opinion is omitted.

property it was insuring, in whose charge it was, and every fact which affected the risk; and any fraud or imposition in these matters went directly to the foundation of the contract. * * * Reversed.³

SEAL v. FARMERS' & MERCHANTS' INS. CO.

(Supreme Court of Nebraska, 1899. 59 Neb. 253, 80 N. W. 807.)

Action by Lydia G. Seal against the Farmers' & Merchants' Insurance Company. Judgment for defendant. Plaintiff brings error.

SULLIVAN, J. This was an action by Lydia G. Seal against the Farmers' & Merchants' Insurance Company to recover on a fire policy. The jury, in obedience to a peremptory instruction, found the issues in favor of the defendant, and, a motion for a new trial having been denied, judgment was rendered on the verdict. The insured property, a dwelling house in the city of Lincoln, was, at the date of the policy, owned by Harriet A. Coffman, and incumbered by a first mortgage in favor of the plaintiff for \$2,300, and by a second mortgage in favor of J. H. McMurtry for \$2,200. W. B. Seal, the plaintiff's agent, was engaged in the business of loaning money on real estate, and was in the habit of applying to the defendant's agent, B. W. Richards, for insurance to protect his loans.

On July 19, 1894, Seal called on Richards, and made a verbal application for a policy on the Coffman property. What then transpired pertinent to the question here considered is shown by the following testimony of Richards: "Q. What inquiry did you make about incumbrance, and what did Mr. Seal state to you about incumbrance? A. Why, I asked Mr. Seal this question, as I do invariably, for the amount of incumbrance upon the property, and he said it was \$2,300. I think I asked him who the policy should be made payable to, and he said Lydia G. Seal and J. H. McMurtry."

This testimony is not disputed. Neither is it claimed that there was any disclosure of the \$2,200 mortgage, or that the company knew of its existence, before the loss occurred. The policy provides that: "If the property above mentioned, or any part thereof, be, or shall hereafter become, mortgaged or otherwise incumbered, * * * without notice to and consent of this company indorsed hereon, then, and in every such case, this shall be void."

It is shown conclusively that E. A. Becker, the secretary and examiner of the company, was influenced to accept the risk and issue the policy by the representation that the incumbrance on the property was \$2,300. He testified that, under the rules of the company, the risk would have been declined had the actual amount of the incum-

³ Compare *British & Foreign Marine Ins. Co. v. Cummings*, 113 Md. 350, 76 Atl. 571 (1910).

brance been disclosed. What is commonly known as the "loss payable clause," is as follows: "Notice accepted of an incumbrance of \$2,300 on premises herein described. Loss, if any, under this policy, first payable to Lydia G. Seal, mortgagee, as her interest may appear. After the interest of Lydia G. Seal as mortgagee has been satisfied, loss, if any, payable to Jas. H. McMurtry or assigns, mortgagee, as his interest may appear."

The plaintiff contends that this clause advised the company that both she and McMurtry had mortgage liens on the property, and that, therefore, the representation in regard to the incumbrance should be construed as having reference to and covering only the plaintiff's mortgage. We are not able to accept this view of the matter. The policy was issued at the instance of W. B. Seal, and the quoted testimony gives no indication, we think, that he intended to convey to the insurer the idea that the incumbrance mentioned was owned exclusively by his principal. The just interpretation is that the sum named was intended to cover all liens to which the property was subject. As there was nothing said about the amount of either mortgage, the natural inference would be that the aggregate of both liens was \$2,300. There is nothing to show that the misstatement with respect to the incumbrance was fraudulently made, and we assume that it was the result of an honest mistake on the part of Mr. Seal.

The question, then, is whether, under the conceded facts, the misrepresentation rendered the contract void. It has been held that, when the application is oral, and no inquiry is made as to the character or condition of the title, mere silence will not avoid the policy. *Insurance Co. v. Bachler*, 44 Neb. 549, 62 N. W. 911; *Insurance Co. v. Bohn*, 48 Neb. 743, 67 N. W. 774; *Slobodisky v. Insurance Co.*, 53 Neb. 816, 74 N. W. 270. But we know of no case holding that the misstatement of a material fact inducing the acceptance of the risk will not vitiate the contract.

When the insurer makes inquiry about facts material to the risk, he is justified in acting on the assumption that the information imparted by the applicant for insurance is correct. He is entitled to know whether the property to be insured is incumbered, and, if so, to what extent, so that he may act intelligently in determining whether he will accept or decline the risk. The representations of the applicant become the basis of insurance, and, if they be false touching matters material to the risk, the contract obtained through their influence cannot be enforced; and it is in such case quite immaterial whether the misstatement resulted from bad faith or from accident or ignorance. *Davenport v. Insurance Co.*, 6 Cush. (Mass.) 340; *Hayward v. Insurance Co.*, 10 Cush. (Mass.) 444; *Brown v. Insurance Co.*, 11 Cush. (Mass.) 280; *Jacobs v. Insurance Co.*, 7 Allen (Mass.) 132; *Anderson v. Fitzgerald*, 4 H. L. Cas. 484; *Byers v. Insurance Co.*, 35 Ohio St. 606, 35 Am. Rep. 623; *Ryan v. In-*

insurance Co., 46 Wis. 671, 1 N. W. 426; Glade v. Insurance Co., 56 Iowa, 400, 9 N. W. 320.

Our conclusion is that the company was induced to issue the policy in suit by the false representation as to a material fact connected with the subject-matter of the contract, that the condition against undisclosed liens was broken, and that the district court was, therefore, right in directing a verdict for the defendant. Since this conclusion leads to an affirmance of the judgment, other questions discussed by counsel need not be considered. The judgment is affirmed.⁴

II. Promissory Representations ⁵

KIMBALL v. ÆTNA INS. CO.

(Supreme Judicial Court of Massachusetts, 1865. 9 Allen, 540, 85 Am. Dec. 786.)

Two actions of contract on policies of insurance issued by the defendants respectively upon a dwelling-house of the plaintiff in Bradford, dated January 17, 1862, and payable in case of loss to Jacob Kimball, mortgagee.

The policy of the Ætna Company contained the following provisions: "It being covenanted as a condition of this contract that the company are not to be liable * * * for loss or damage, if the assured in the written or verbal application for insurance makes any erroneous representation materially increasing the risk." "Any change within the control of the assured, material to the risk, shall avoid this policy."

The policy of the Springfield Company contained the following provisions: "If the situation or circumstances affecting the risk thereupon shall be so altered or changed by or with the advice, agency or consent of the assured, as to increase the risk thereupon * * * the risk thereupon shall cease and determine, and the policy be null and void." "If the premises insured shall be vacated and so remain for thirty days, without notice to this company, this policy shall cease and determine."

The two actions were tried together in this court, before Metcalf, J., and the defendants offered to prove that they had issued previous policies on the same premises, which were to expire on the 17th of January 1862; that the house was then unoccupied; that on the 6th

⁴ Compare *Mascott v. Insurance Co.*, ante, p. 197.

⁵ For discussion of principles, see *Vance on Insurance*, § 101. See, also, *Cooley, Briefs on the Law of Insurance*, vol. 2, p. 1477.

of January, 1862, an incendiary attempt was made to burn it, of which the plaintiff informed the agent of the defendants; that on the 17th of January the plaintiff applied for a renewal of the policies to the agent, who informed him that unless the house was occupied he could not renew them without consulting the companies and stating all the facts, and in that case he did not think the companies would authorize him to insure the property at all, but if occupied it could be insured at the same rate as in previous years. The plaintiff said in reply that the agent might renew the policies as before, as the house would be occupied; that he had a man in view who was going to occupy it. The agent thereupon wrote and delivered the policies. The house remained unoccupied till June 26, 1862, when it was burned by an incendiary. It was admitted, for the purposes of this trial, that the occupancy of the house was a material fact, under the circumstances.

The judge ruled that the representations, if proved, would not constitute a legal defence, and instructed the jury to return verdicts for the plaintiff, which was accordingly done. The defendants alleged exceptions.

GRAY, J.* The ruling of the judge who presided at the trial was in accordance with the opinion which had been repeatedly expressed by this court in previous cases. *Higginson v. Dall*, 13 Mass. 99, 100; *Whitney v. Haven*, 13 Mass. 172; *Rice v. New England Ins. Co.*, 4 Pick. 442, 443; *Bryant v. Ocean Ins. Co.*, 22 Pick. 200. That opinion has been ingeniously and elaborately criticised and controverted by learned writers to whose commentaries the defendants have referred; but a careful re-examination has satisfied us that it is founded upon elementary principles of the law of insurance, and supported by the adjudged cases in England and in the United States.

The contract of insurance is a contract to indemnify the owner of certain property against certain risks. This contract is founded upon the representations previously made by the assured to the insurer. The condition and circumstances of the property are within the knowledge of the owner more than of the insurer, and must be truly represented by the former to the latter, in order that he may estimate the risk before entering into the contract. In making this representation, the utmost good faith is required. If an existing fact material to the risk is misrepresented by the owner to the underwriter, the minds of the parties never meet, they agree on no subject matter to which the contract can attach, the contract founded on such misrepresentation never takes effect, the underwriter may treat it as a nullity, and the other party, unless chargeable with fraud, may recover back the premium. If representations, whether oral or written, concerning facts existing when the policy is signed, are false, it never has any existence as a contract, unless it contains in itself terms which expressly

* Part of the opinion is omitted.

or by necessary implication waive or supersede the previous representations. If the representations are positive and not of mere opinion or belief, it matters not whether they are made at or before the time of the execution of the policy, nor whether they are expressed in the present or the future tense, if they relate to what the state of facts is or will be when the policy is executed and the risk of the underwriter begins. If the facts are then materially different from the representations, the whole foundation of the contract fails, the risk does not attach, the policy never becomes a contract between the parties. Representations of facts existing at the time of the execution of the policy need not be inserted in it; for they are not necessary parts of it, but, as is sometimes said, collateral to it. They are its foundation; and if the foundation does not exist, the superstructure does not arise. Falsehood in such representations is not shown to vary or add to the contract, or to terminate a contract which has once been made; but to show that no contract has ever existed.

The word "representations" has not always been confined in use to representations of facts existing at the time of making the policy; but has been sometimes extended to statements made by the assured concerning what is to happen during the term of the insurance; in other words, not to the present, but to the future; not to facts which any human being knows or can know, but to matters of expectation or belief, or of promise and contract. Such statements (when not expressed in the form of a distinct and explicit warranty which must be strictly complied with) are sometimes called "promissory representations," to distinguish them from those relating to facts, or "affirmative representations." And these words express the distinction; the one is an affirmation of a fact existing when the contract begins; the other is a promise, to be performed after the contract has come into existence. Falsehood in the affirmation prevents the contract from ever having any life; breach of the promise could only bring it to a premature end. A promissory representation may be inserted in the policy itself; or it may be in the form of a written application for insurance, referred to in the policy in such a manner as to make it in law a part thereof; and in either case the whole instrument must be construed together. But this instrument is the expression, and the only evidence, of the duties, obligations and promises to be performed by each party while the insurance continues. To make the continuance or termination of a written contract, which has once taken effect, dependent on the performance or breach of an earlier oral agreement, would be to violate a fundamental rule of evidence. A representation that a fact now exists may be either oral or written; for if it does not exist, there is nothing to which the contract can apply. But an oral representation as to a future fact, honestly made, can have no effect; for if it is a mere statement of an expectation, subsequent disappointment will not prove that it was untrue; and if it is a promise

that a certain state of facts shall exist or continue during the term of the policy, it ought to be embodied in the written contract.

In the cases now before us, there was no representation that the house was already occupied, and no representation or agreement that it should be occupied the instant the policies took effect. The plaintiff's statement was that "the house would be occupied; that he had a man in view who was going to occupy it." There is nothing to show that this statement was not made in the most perfect good faith. Giving it the strongest possible interpretation against the plaintiff, it was a promise that the house should be occupied within a reasonable time, and the policies attached as soon as they were made and continued in force until such reasonable time had elapsed. The policies, having once taken effect, cannot be terminated or avoided, in the absence of fraud, by the subsequent breach of an oral agreement made before they were executed. * * * Exceptions overruled.

III. Construction of Representations [†]

MOULOR v. AMERICAN LIFE INS. CO.

(Supreme Court of United States, 1884. 111 U. S. 335, 4 Sup. Ct. 466, 28 L. Ed. 447.)

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

HARLAN, Justice.⁸ This is an action upon a policy of insurance issued by the American Life Insurance Company of Philadelphia. By its terms the amount insured—\$10,000—is payable to Emilie Moulor, the plaintiff in error, her executors, administrators, and assigns, within 60 days after due notice and satisfactory proof of interest and of the death of her husband, the insured, certain indebtedness to the company being first deducted. Upon the first trial there was a verdict for the plaintiff, which was set aside and a new trial awarded. At the next trial the jury were peremptorily instructed to find for the company, and judgment was accordingly entered in its behalf. Upon writ of error to this court that judgment was reversed upon the ground that, as to certain issues arising out of the evidence, the case should have been submitted to the jury. *Moulor v. Ins. Co.*, 101 U. S. 708, 25 L. Ed. 1077. At the last trial there was a verdict and judgment for the defendant. * * *

[†] For discussion of principles, see *Vance on Insurance*, §§ 102, 103.

⁸ Part of the opinion is omitted.

The seventh question in the application for insurance required the insured to answer yes or no, as to whether he had ever been afflicted with any of the following diseases: Insanity, gout, rheumatism, palsy, scrofula, convulsions, dropsy, small-pox, yellow-fever, fistula, rupture, asthma, spitting of blood, consumption, and diseases of the lungs, throat, heart, and urinary organs. As to each the answer of the insured was, no.

The tenth question was: "Has the party's father, mother, brothers, or sisters been afflicted with consumption or any other serious family disease, such as scrofula, insanity, etc.?" The answer was, "No, not since childhood."

The fourteenth question was: "Is there any circumstance which renders an insurance on his life more than usually hazardous, such as place of residence, occupation, physical condition, family history, hereditary predispositions, constitutional infirmity, or other known cause, or any other circumstance or information with which the company ought to be made acquainted?" The answer was, "No."

To the sixteenth question, "Has the applicant reviewed the answers to the foregoing questions, and is it clearly understood and agreed that any untrue or fraudulent answers, or any suppression of facts in regard to health, habits, or circumstances, or neglect to pay the premium on or before the time it becomes due, will, according to the terms of the policy, vitiate the same and forfeit all payments made thereon?" the answer was, "Yes."

At the close of the series of questions, 19 in number, propounded to and answered by the applicant, are the following paragraphs:

"It is hereby declared and warranted that the above are fair and true answers to the foregoing questions; and it is acknowledged and agreed by the undersigned that this application shall form a part of the contract of insurance, and that if there be, in any of the answers herein made, any untrue or evasive statements, or any misrepresentation or concealment of facts, then any policy granted upon this application shall be null and void, and all payments made thereon shall be forfeited to the company.

"And it is further agreed that if at any time hereafter the company shall discover that any of said answers or statements are untrue or evasive, or that there has been any concealment of facts, then, and in every such case, the company may refuse to receive further premiums on any policy so granted upon this application, and said policy shall be null and void, and payments forfeited as aforesaid."

The policy recites that the agreement of the company to pay the sum specified is "in consideration of the representations made to them in the application," and of the payment of the premium at the time specified; further, "it is hereby declared and agreed that if the representations and answers made to this company, on the application for this policy, upon the full faith of which it is issued,

shall be found to be untrue in any respect, or that there has been any concealment of facts, then and in every such case the policy shall be null and void."

The main defense was that the insured had been afflicted with scrofula, asthma, and consumption prior to the making of his application, and that, in view of his statement that he had never been so afflicted, the policy was, by its terms, null and void. There was, undoubtedly, evidence tending to show that the insured had been afflicted with those diseases, or some of them, prior to his application; but there was also evidence tending to show not only that he was then in sound health, but that, at the time of his application, he did not know or believe that he had ever been afflicted with any of them in a sensible, appreciable form. * * *

Assuming—as in view of the finding of the jury we must assume—that the insured was at the date of his application, or had been prior thereto, afflicted with the disease of scrofula, asthma, or consumption, the question arises whether the beneficiary may not recover, unless it appears that he had knowledge, or some reason to believe, when he applied for insurance, that he was or had been afflicted with either of those diseases. The circuit court plainly proceeded upon the ground that his knowledge or belief as to having been afflicted with the diseases specified, or of some one of them, was not an essential element in the contract; in other words, if the assured ever had, in fact, any one of the diseases mentioned in his answer to the seventh question, there could be no recovery, although the jury should find from the evidence that he acted in perfect good faith, and had no reason to suspect, much less to believe or know, that he had ever been so afflicted. If, upon a reasonable interpretation, such was the contract, the duty of the court is to enforce it according to its terms; for the law does not forbid parties to a contract for life insurance to stipulate that its validity shall depend upon conditions or contingencies such as the court below decided were embodied in the policy in suit. The contracts involved in *Jeffries v. Life Ins. Co.*, 22 Wall. 47, 22 L. Ed. 833, and *Ætna Life Ins. Co. v. France, etc.*, 91 U. S. 510, 23 L. Ed. 401, were held to be of that kind.

But unless clearly demanded by the established rules governing the construction of written agreements, such an interpretation ought to be avoided. In the absence of explicit, unequivocal stipulations requiring such an interpretation, it should not be inferred that a person took a life policy with the distinct understanding that it should be void, and all premiums paid thereon forfeited, if at any time in the past, however remote, he was, whether conscious of the fact or not, afflicted with some one of the diseases mentioned in the question to which he was required to make a categorical answer. If those who organize and control life insurance companies wish to exact from the applicant, as a condition precedent to a valid con-

tract, a guaranty against the existence of diseases, of the presence of which in his system he has and can have no knowledge, and which even skillful physicians are often unable, after the most careful examination, to detect, the terms of the contract to that effect must be so clear as to exclude any other conclusion. * * *

These rules of interpretation, equally applicable in cases of life insurance, forbid the conclusion that the answers to the questions in the application constituted warranties, to be literally and exactly fulfilled, as distinguished from representations which must be substantially performed in all matters material to the risk; that is, in matters which are of the essence of the contract.

We have seen that the application contains a stipulation that it shall form a part of the contract of insurance; also, that the policy purports to have been issued upon the faith of the representations and answers in that application. Both instruments, therefore, may be examined to ascertain whether the contract furnishes a uniform, fixed rule of interpretation, and what was the intention of the parties. Taken together, it cannot be said that they have been so framed as to leave no room for construction. The mind does not rest firmly in the conviction that the parties stipulated for the literal truth of every statement made by the insured. There is, to say the least, ground for serious doubt as to whether the company intended to require, and the insured intended to promise, an exact, literal fulfillment of all the declarations embodied in the application. It is true that the word "warranted" is in the application; and, although a contract might be so framed as to impose upon the insured the obligations of a strict warranty, without introducing into it that particular word, yet it is a fact, not without some significance, that that word was not carried forward into the policy, the terms of which control, when there is a conflict between its provisions and those of the application. The policy upon its face characterizes the statements of the insured as representations. Thus, we have one part of the contract apparently stipulating for a warranty, while another part describes the statements of the assured as representations. The doubt, as to the intention of the parties, must, according to the settled doctrines of the law of insurance, recognized in all the adjudged cases, be resolved against the party whose language it becomes necessary to interpret. The construction must, therefore, prevail which protects the insured against the obligations arising from a strict warranty.

But it is contended that if the answers of the assured are to be deemed representations only, the policy was, nevertheless, forfeited, if those representations were untrue in respect of any matters material to the risk. The argument is that if the insured was, at the time of his application, or had been at any former period of his life, seriously or in an appreciable sense, afflicted with scrofula, asthma, or consumption, his answer, without qualification, that he

had never been so afflicted, being untrue, avoided the policy, without reference to any knowledge or belief he had upon the subject. The soundness of this proposition could not be disputed if, as assumed, the knowledge or good faith of the insured, as to the existence of such diseases, was, under the terms of the contract in suit, of no consequence whatever in determining the liability of the company. But is that assumption authorized by a proper interpretation of the two instruments constituting the contract? We think not.

Looking into the application, upon the faith of which the policy was issued and accepted, we find much justifying the conclusion that the company did not require the insured to do more, when applying for insurance, than observe the utmost good faith, and deal fairly and honestly with it, in respect of all material facts about which inquiry is made, and as to which he has or should be presumed to have knowledge or information. The applicant was required to answer yes or no as to whether he had been afflicted with certain diseases. In respect of some of those diseases, particularly consumption, and diseases of the lungs, heart, and other internal organs, common experience informs us that an individual may have them in active form, without, at the time, being conscious of the fact, and beyond the power of any one, however learned or skillful, to discover. Did the company expect, when requiring categorical answers as to the existence of diseases of that character, that the applicant should answer with absolute certainty about matters of which certainty could not possibly be predicated? Did it intend to put upon him the responsibility of knowing that which, perhaps, no one, however thoroughly trained in the study of human diseases, could possibly ascertain? We shall be aided in the solution of these inquiries by an examination of other questions propounded to the applicant. In that way we may ascertain what was in the minds of the parties.

Beyond doubt the phrase "other known cause," in the fourteenth question, serves the double purpose of interpreting and qualifying all that precedes it in the same clause or sentence. For instance, the applicant was not required to state all the circumstances within his recollection of his family history, but those only which rendered the proposed insurance more than usually hazardous, and of which he had personal knowledge or of which he had information fairly justifying a belief of their existence. If he omitted to state circumstances in his "family history" of which he had no knowledge, nor any information deserving attention, that omission would not avoid the policy, although it subsequently appeared that those circumstances, if known to the company, would have shown that the proposed insurance was more than usually hazardous. Apart from other questions or clauses in the application, the tenth question would indicate that an incorrect or untrue answer as to whether the applicant's

"father, mother, brothers, or sisters had been affected with consumption, or any other serious family disease, such as scrofula, insanity, etc.," would absolve the company from all liability. Yet, in the fourteenth question, the insured, being asked as to his family history and as to "hereditary predispositions"—an inquiry substantially covering some of the specific matters referred to in the tenth question—was, as we have seen, only required to state such circumstances as were known to him, or of which he had information, and which rendered an insurance upon his life more than usually hazardous. So, in reference to that part of the fourteenth question relating to the then physical condition of the applicant. Suppose at the time of his application he had a disease of the lungs or heart, but was entirely unaware that he was so affected. In such a case he would have met all the requirements of that particular question, and acted in the utmost good faith, by answering no, thereby implying that he was aware of no circumstance in his then physical condition which rendered an insurance upon his life more than usually hazardous. And yet, according to the contention of the company, if he had, at any former period of his life, been afflicted with a disease of the heart or lungs, his positive answer to the seventh question, that he had not been so afflicted, was fatal to the contract; this, although the applicant had no knowledge or information of the existence at any time of such a disease in his system. So, also, in reference to the inquiry in the fourteenth question as to any "constitutional infirmity" of the insured. If, in answering that question, he was required to disclose only such constitutional infirmities as were then known to him, or which he had reason to believe then existed, it would be unreasonable to infer that he was expected, in answer to a prior question, in the same policy, to guarantee absolutely, and as a condition precedent to any binding contract, that he had never, at any time, been afflicted with diseases of which, perhaps, he never had and could not have any knowledge whatever.

The entire argument in behalf of the company proceeds upon a too-literal interpretation of those clauses in the policy and application which declare the contract null and void if the answers of the insured to the questions propounded to him were, in any respect, untrue. What was meant by "true" and "untrue" answers? In one sense, that only is true which is conformable to the actual state of things. In that sense, a statement is untrue which does not express things exactly as they are. But in another and broader sense the word "true" is often used as a synonym of honest, sincere, not fraudulent. Looking at all the clauses of the application, in connection with the policy, it is reasonably clear—certainly the contrary cannot be confidently asserted—that what the company required of the applicant, as a condition precedent to any binding contract, was, that he would observe the utmost good faith towards it, and make full, direct, and honest answers to all questions, without evasion or fraud.

and without suppression, misrepresentation, or concealment of facts with which the company ought to be made acquainted; and that by so doing, and only by so doing, would he be deemed to have made "fair and true answers."

If it be said that an individual could not be afflicted with the diseases specified in the application, without being cognizant of the fact, the answer is that the jury would, in that case, have no serious difficulty in finding that he had failed to communicate to the company what he knew or should have known was material to the risk, and that, consequently, for the want of "fair and true answers," the policy was, by its terms, null and void. But, whether a disease is of such a character that its existence must have been known to the individual afflicted with it, and therefore whether an answer denying its existence was or not a fair and true answer, is a matter which should have been submitted to the jury. It was an erroneous construction of the contract to hold, as the court below did, that the company was relieved from liability if it appeared that the insured was, in fact, afflicted with the diseases, or any of them, mentioned in the charge of the court. The jury should have been instructed, so far as the matters here under examination are concerned, that the plaintiff was not precluded from recovering on the policy, unless it appeared from all the circumstances, including the nature of the diseases with which the insured was alleged to have been afflicted, that he knew, or had reason to believe, at the time of his application, that he was or had been so afflicted.

It results from what has been said that the judgment must be reversed, with directions to set aside the verdict, and for further proceedings consistent with this opinion. It is so ordered.

MUTUAL LIFE INS. CO. OF NEW YORK v. MULLEN.

(Court of Appeals of Maryland, 1908. 107 Md. 457, 69 Atl. 385.)

Action by Thomas M. Mullen and another as executors of Catherine T. Mullen against the Mutual Life Insurance Company of New York. From a judgment for plaintiffs, defendant appeals.

WORTHINGTON, J.* * * Several important questions concerning the law of life insurance are involved in the appeal which we will now proceed to consider. Before the Act of 1894, p. 1059, c. 662, it was always a matter of great importance in considering a case like this to determine at the outset whether the answers and statements of the applicant as contained in his application for insurance were warranties or mere representations. If the former, the policy was avoided, unless such statements and answers were literally true, wheth-

* Part of the opinion is omitted.

er they related to matters material to the risk or not. *Monahan v. Ins. Co.*, 103 Md. 156, 63 Atl. 211, 5 L. R. A. (N. S.) 759; *Md. Casualty Co. v. Gehrmann*, 96 Md. 648, 54 Atl. 678; *Bankers' Life Ins. Co. v. Miller*, 100 Md. 1, 59 Atl. 116. If the latter, the policy was not avoided, unless the answers and statements were false in relation to some matters material to the risk. *Bankers' Life Ins. Co. v. Miller*, *supra*.

By the aid of warranties, and the innocent mistakes of the insured, it often happened that the insurer was able to escape liability on a ground of the purest technicality. For the purpose of relaxing the harsh rule of the common law which required warranties to be literally true without regard to their materiality to the risk, the Act of 1894, p. 1059, c. 662, was passed. That act, which is a literal copy of the Pennsylvania statute, and similar to the statutes of some other states on the same subject, is as follows: "Whenever the application for a policy of life insurance contains a clause of warranty of the truth of the answers therein contained, no misrepresentation or untrue statement in such application made in good faith by the applicant, shall effect a forfeiture, or be a ground of defense in any suit brought upon any policy of insurance issued upon the faith of such application, unless such misrepresentation or untrue statement relate to some matter material to the risk." Code Pub. Gen. Laws 1904, art. 23, § 196.

In construing the Pennsylvania statute which as we have said is identical with our own, the Supreme Court of that state says: "The meaning of this language is perfectly plain. A misrepresentation or untrue statement in an application, if made in good faith, shall not void the policy, unless it relate to some matter material to the risk. If the matter is not material to the risk, and the statement is made in good faith, although it is untrue, it shall not avoid the policy." *March v. Life Ins. Co.*, 186 Pa. 641, 40 Atl. 1100, 65 Am. St. Rep. 887.

In other words, the statute was passed to prevent the defeat of the ends of justice by mere technicality. It is remedial in character, and should be given such liberal and reasonable interpretation as will insure judicial investigation in the ordinary way of the question whether any particular statement in the application was untrue, and, if untrue, whether it was material to the risk. If the statement is found to be untrue and material, the penalty of the forfeiture of the policy will usually follow as of course, whether the answer be made in good faith or in bad faith. *Penn Mutual v. Savs. Bank*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33; *Id.*, 73 Fed. 653, 19 C. C. A. 316, 38 L. R. A. 70.

As the application in this case contains a clause of warranty of the truth of the answers therein contained, and as the application is referred to in, and made a part of, the policy, the statute by its very terms is applicable, unless other circumstances render it inapplicable. And the appellant contends that this act is not applicable to the case at bar for two reasons:

First. Because the contract of insurance expressly provides that it shall be subject to the charter of the company, and of the laws of the state of New York, and, as there is no evidence of a similar statute to our own in force in that state, this court will presume that the common law prevails there, and that consequently this contract must be construed accordingly to the rules of the common law. Citing Ficklin's Case, 74 Md. 172, 21 Atl. 680, 23 Atl. 197.

Second. Because as the defendant company is a mutual one, as is alleged, the contract of insurance must be construed in accordance with the laws of the state where the company was created, and agreeably to its charter, in order to preserve the scheme of mutuality as was done in Brashears' Case, 89 Md. 624, 43 Atl. 866, 73 Am. St. Rep. 244

In answer to the first reason assigned, we refer to the case of Keatley v. Travelers' Ins. Co., 187 Pa. 197, 40 Atl. 808, where it was attempted to evade the provisions of the Pennsylvania act by reciting in the policy that it should be construed by the laws of Connecticut. The court in that case held that such an agreement was against public policy, and that the contract must be governed by the laws of Pennsylvania, where the contract was made. A similar rule was adopted in Massachusetts in the case of Dolan v. Mutual Reserve, 173 Mass. 197, 53 N. E. 398, the court saying: "The contract was made in Massachusetts through its agent here, and the policy was delivered and paid for here. It is therefore governed by our laws." The same rule was applied in Fidelity Mutual Life Ass'n v. Jeffords, 107 Fed. 402, 46 C. C. A. 377, 53 L. R. A. 193, and in Fletcher v. New York Life Ins. Co. (C. C.) 13 Fed. 526.

In a suit in the United States Circuit Court, Sixth Circuit, on a policy of insurance issued by a Pennsylvania corporation to a person in Maryland, full effect is given to the Maryland statute. Fidelity Mutual Life Ass'n v. Miller, 92 Fed. 63, 34 C. C. A. 211. See, also, Equitable Assur. Co. v. Pettus, 140 U. S. 226, 11 Sup. Ct. 822, 35 L. Ed. 497.

We think, therefore, that while it is perfectly true that, in the absence of proof to the contrary, the common law is presumed to be in full force, and to be the same as the common law of the forum, in all those states which were originally colonies of England (8 Cyc. 387, B); and although in Ficklin's Case *supra*, this court gave the benefit of the remedial statute of Pennsylvania, before its adoption by the Legislature of this state, to one of our citizens suing in the courts of this state upon a contract made here by a Pennsylvania corporation, yet we deem it against public policy to permit a contract of insurance made here since the passage of the act of 1894 with a citizen of this state, to be governed by the harsh rules of the common law which, by legal presumption merely, is supposed to obtain in the state of New York by whose laws it is sought to have this contract construed.

When a corporation undertakes to do business beyond the territorial limits of the state creating it, it does so merely by comity, and the state which it enters for the purpose of transacting business therein has the power to require such corporation to carry on its business there subject to its statutes, and this court will not allow the parties to such contracts as this, by any stipulations contained therein to contravene the salutary provisions of this statute intended for the protection of our own citizens against common-law warranties. *New York Life v. Cravens*, 178 U. S. 389, 20 Sup. Ct. 962, 44 L. Ed. 1116.

In answer to the second reason assigned, we have only to say that in the *Brashears' Case*, *supra*, the insurer was the Royal Arcanum, a purely mutual benefit association, which is not controlled in this respect by the ordinary rules of life insurance (*Penn Mutual v. Savings Bank*, 72 Fed. 413, 19 C. C. A. 286, 38 L. R. A. 33; *Id.*, 73 Fed. 653, 19 C. C. A. 316, 38 L. R. A. 70); and, besides, in this case we have no knowledge that the appellant is in fact a mutual company, except the inference to be drawn from the single word "Mutual" contained in its corporate name. We think it is perfectly clear, therefore, that as the first premium on the policy was paid in this state by a citizen of this state, and the policy delivered here, that it is a Maryland contract, and to be governed by Maryland laws.

The act of 1894, p. 1059, c. 662, being applicable to this case, as we think it clearly is, the burden of proving the untruth of the insured's statements and answers in his application, and also, if untrue, that they relate to some matters material to the risk, or that they were not made in good faith, was upon the defendant, if it relied upon fraud or misrepresentation on the part of the insured as a defense to the action. *Brashears' Case*, 89 Md. 633, 43 Atl. 866, 73 Am. St. Rep. 244; *May on Ins.* § 183. * * * Reversed.¹⁰

IV. Warranties—In General ¹¹

GAINES v. FIDELITY & CASUALTY CO. OF NEW YORK.

(Court of Appeals of New York, 1907. 188 N. Y. 411, 81 N. E. 169, 11 Ann. Cas. 71.)

Action by Lottie Gaines against the Fidelity & Casualty Company of New York on an accident policy. From a judgment of the Appellate Division (111 App. Div. 386, 97 N. Y. Supp. 836), affirming a judgment for defendant, plaintiff appeals.

¹⁰ Compare *Lynch v. Prudential Ins. Co. of America*, *post*, p. 228.

¹¹ For discussion of principles, see *Vance on Insurance*, § 104. See, also, *Cooley, Briefs on the Law of Insurance*, vol. 2, p. 1120; vol. 3, p. 1928.

GRAY, J.¹² The policy in question insured Ulysses Gaines against bodily injury, resulting in death, in the sum of \$2,000. It stated that the defendant insured him "in consideration of * * * the statements in the schedule hereinafter contained, which statements the insured makes on the acceptance of this policy and warrants to be true." The warranties contained in the schedule of the policy included the statement, in answer to a question as to the "relationship" of this plaintiff, whom the insured had named as the payee, that she was his wife. The assured was killed by a pistol shot, fired by another, and this action by the plaintiff, as the beneficiary named in the policy, was defended upon the ground, among others, that there had been a breach of the warranty, in that she was not the wife of the assured. The result of the trial was that the jury found a verdict in favor of the defendant upon this question of fact and the unanimous affirmance of the judgment thereupon is conclusive.

The question of law, which has survived, is raised by exceptions taken by the plaintiff to the charge of the trial court that she could not recover unless she was, at the time of the insurance, the wife of the person assured. As the question of fact was submitted to the jurors by the trial judge, they were to determine whether there was any agreement between the assured and the plaintiff to enter into the marital relationship, and, if there was, whether, the plaintiff's prior marriage to another having been conceded, she was "capable of entering into that relationship"; that is, "had she married the assured in good faith believing her husband to be dead."

The question of the avoidance of the contract, under the clause of the policy relating to injuries intentionally inflicted by another upon the insured, was within the issues of the case; but the instructions to the jurors required them, if they decided for the defendant upon that defense, to return a verdict for the plaintiff for \$16, the amount of the premium, according to the terms of the policy.

The argument of the appellant, in substance and effect, is that the representation of the assured that Lottie Gaines was his wife was not material, and should be considered as matter of description, and not of warranty. This was, however, a distinctly expressed warranty, the truth of which was a condition of liability and was of the basis of the contract itself. The effect of making the statement a part of the policy and of warranting it to be true was, in law, to induce the defendant's agreement to insure, and the statement became material. It is a general rule, and one which the decisions of this court have asserted, that the materiality of the fact stated by the assured is of no consequence, if the contract be that the matter is as represented, and that, unless it prove so, whether from fraud, mistake, negligence, or other cause, not proceeding from the insurer, or the intervention of the law, or the act of God, the assured can have no claim. May on

¹² Part of the opinion is omitted.

Insurance, § 156; *Foot v. Ætna Life Ins. Co.*, 61 N. Y. 571, 577; *Cushman v. U. S. Life Ins. Co.*, 63 N. Y. 404, 409; *Donley v. Glens Falls Life Ins. Co.*, 184 N. Y. 107, 76 N. E. 914, 6 Ann. Cas. 81.

The author of the text-book cited well observes: "One of the very objects of the warranty is to preclude all controversy about the materiality or immateriality of the statement." The parties to this contract had the right to make any statements of fact material thereto and conditions precedent to any liability thereupon, all things being equal at the time in their attitude to each other, and if they proved false the contract was avoided. The insurer was entitled to know the actual relationship, which the person, for whom the assured desired the benefit of the insurance contract, sustained to him, for it bore upon the risk which it was to assume. The inquiry related to the risk, the statement in the answer was made a warranty to be contained in the policy, and, it having been determined that the statement was untrue, the right to recover upon the contract was forfeited. * * * Judgment affirmed.¹³

CHAMBERS v. NORTHWESTERN MUT. LIFE INS. CO.

(Supreme Court of Minnesota, 1896. 64 Minn. 495, 67 N. W. 367, 58 Am. St. Rep. 549.)

Action by George W. Chambers, administrator, against the Northwestern Mutual Life Insurance Company. There was a judgment for plaintiff, and from an order denying a new trial defendant appeals.

MITCHELL, J.¹⁴ This was an action on a policy of insurance on the life of plaintiff's intestate. The complaint alleged the issuing of the policy, the death of the insured, the furnishing of proofs of loss, and the refusal of the defendant to pay; also, generally, that the insured and the plaintiff had each fulfilled all the conditions of the policy. The policy, which was attached to the complaint, provided that the insured's application was made a part of the policy; also, that "if any fraudulent representation or statement shall be made in the application, * * * then and in every such case the policy shall be null and void." The application, which was introduced in evidence, contained numerous questions to the applicant and his answers thereto. All of these related to then existing or past facts. It also contained an agreement, signed by the applicant, that all the statements and answers written on the application, including those made to the medical examiner, are warranted to be true, and to be full and fair answers to the questions, without evasion or concealment, and are offered to the company as a consideration for the contract of insurance.

Defendant, in its answer, admitted the issuing of the policy, the

¹³ Compare *Vivar v. Supreme Lodge*, post, p. 223.

¹⁴ Part of the opinion is omitted.

death of the insured, the furnishing of proofs of death, and a refusal on its part to pay, but, except as thus admitted, denied all the allegations of the complaint. It then alleged that the answers to the following questions in the application were false and untrue: "Have you ever had disease of the heart? Ans. No. Do you use malt or spirituous beverages? Ans. No. Have you always been temperate? Ans. Yes. Is there anything, or has there ever been anything, in your physical condition, family or personal history, or habits, tending to shorten your life, which is not distinctly set forth above? Ans. No." And that by reason of said false and fraudulent representations, and each of them, said policy or contract of insurance is null and void.

* * *

Was the burden on the plaintiff to allege and prove the truth of the answers to the questions contained in the application, or was it upon the defendant to allege and prove their falsity? Defendant's contention is that because, if any of these answers were false, the policy would be void ab initio, therefore they were conditions precedent, and hence, according to a familiar rule, the burden was on the plaintiff to allege and prove that they were true. The law is so well settled otherwise that it would hardly seem to require discussion.

For the purposes of this case it is immaterial whether these answers are to be deemed warranties or mere representations, for the rule of pleading and proof would be the same in either case. Hence we shall assume, most favorably to the defendant, that the answers are warranties. A condition precedent, as known in the law, is one which is to be performed before the agreement of the parties becomes operative. A condition precedent calls for the performance of some act or the happening of some event after the contract is entered into, and upon the performance or happening of which its obligation is made to depend. In the case of a mere warranty, the contract takes effect and becomes operative immediately. It is true that, where a policy of insurance so provides, if there is a breach of a warranty, the policy is void ab initio. But this does not change the warranty into a condition precedent, as understood in the law. It lacks the essential element of a condition precedent, in that it contains no stipulation that an event shall happen or an act shall be performed in the future, before the policy shall become effectual. It is more in the nature of a defeasance, where the insured contracts that, if the representations made by him are not true, the policy shall be defeated and avoided. But, even if these warranties are to be deemed conditions precedent, it has become settled in insurance law, for practical reasons, that the burden is on the insurer to plead and prove the breach of the warranties.

Not only so, but he must, in his pleading, single out the answers whose truth he proposes to contest, and show the facts on which his contention is founded. Otherwise, the insured would enter the trial ignorant as to which of his numerous answers would be assailed as

false. The number of questions in these applications is usually very great, relating to the habits and health of ancestors, the personal habits and condition of the applicant, etc., the truth of many of which it would be impossible to prove affirmatively after the death of the insured. To require such proof on part of the beneficiary would defeat more than half of the life policies ever issued. On the other hand, it is no hardship to require of the insurer, if he believes that any of these answers were false, that he specifically allege which ones he claims to be false, and produce evidence of the truth of his claim. It would be superfluous to cite authorities on this subject; but, to the point that these warranties are not conditions precedent, in the legal sense of the term, we refer to *Redman v. Insurance Co.*, 49 Wis. 431, 4 N. W. 591; and, for a forcible statement of the practical reasons for the rule, to *Insurance Co. v. Ewing*, 92 U. S. 377, 23 L. Ed. 610.

The dictum in *Price v. Insurance Co.*, 17 Minn. 497 (Gil. 473), 10 Am. Rep. 166, that warranties are conditions precedent, the truth of which must be pleaded and proved by the assured, was, we think, inadvertent, and cannot be adhered to. We therefore hold that it was no part of plaintiff's case to either allege or prove the truth of the answers in the application, that the burden of alleging and proving their falsity was on the defendant, that it was bound to specify in its defense the particular answers which it claimed were false, and that on the trial it was properly limited in its proof to those answers which it had specifically alleged to be false. * * * Affirmed.¹⁵

V. Affirmative and Promissory Warranties¹⁶

KNECHT v. MUTUAL LIFE INS. CO. OF NEW YORK.

(Supreme Court of Pennsylvania, 1879. 90 Pa. 118, 35 Am. Rep. 641.)

Amicable action of assumpsit, by A. S. Knecht, administrator of Abram F. Fangboner, deceased, against the Mutual Life Insurance Company of New York. In January, 1868, the deceased applied to the defendant for a policy of insurance upon his life, the application, among other clauses, containing the following: "And the said Abram F. Fangboner further declares that he is not now afflicted with any

¹⁵ The contrary rule prevails in Rhode Island and Connecticut. See *Sweeney v. Metropolitan Life Ins. Co.*, 19 R. I. 171, 36 Atl. 9, 38 L. R. A. 297, 61 Am. St. Rep. 751 (1896); *Hennessey v. Metropolitan Life Ins. Co.*, 74 Conn. 699, 52 Atl. 490 (1902).

¹⁶ For discussion of principles, see *Vance on Insurance*, § 105. See, also, *Cooley, Briefs on the Law of Insurance*, vol. 2, p. 1465; vol. 3, p. 2188.

disease or disorder, and that he does not now, nor will he, practice any pernicious habit that obviously tends to the shortening of life." It is alleged that upon the faith of the conditions and promises in said application, the defendant issued a policy to deceased. Among the provisions of said policy was the following: "If any of the statements or declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, then and in every such case this policy shall be null and void." At the time of making the application for insurance, Fangboner was of correct and temperate habits. Some years after the issuing of the policy he became addicted to the use of intoxicating drinks, from the immoderate use of which he was attacked with delirium tremens, from which he died.¹⁷

PAXSON, J. It is not alleged that in his application for insurance the insured made any false representation of an existing fact. What he did declare was, "that he is not now afflicted with any disease or disorder, and that he does not now, nor will he, practice any pernicious habit that obviously tends to the shortening of life." The case stated sets forth: "That at the times of making the aforesaid application for insurance, the said Abram F. Fangboner was of correct and temperate habits; that some years after the issuing of said policy he became addicted to the use of intoxicating drinks, from the immoderate use of which he was attacked with delirium tremens, from which he died." The policy issued in pursuance of said application contained this provision: "If any of the statements or declarations made in the application for this policy, upon the faith of which this policy is issued, shall be found in any respect untrue, then and in every such case this policy shall be null and void."

It is unnecessary to discuss the question as to whether the declarations of the insured as to existing facts in his application, constitute a warranty. The authorities are by no means uniform upon this point. Our own recent case of *Washington Life Insurance Co. v. Schaible*, 1 Wkly. Notes Cas. 369, holds that they do not constitute such warranty. Where, however, the policy has been issued upon the faith of such representations, and they are false in point of fact, the better opinion seems to be that the policy is avoided. And this is so even where the false statement is to a matter not material to the risk. *Jeffries v. Life Insurance Co.*, 22 Wall. 47, 22 L. Ed. 833. In such case the agreement is that if the statements are false, there is no insurance; no policy is made by the company, and no policy is accepted by the insured.

In the case in hand the policy attached. There was nothing to avoid it *ab initio*. Were the mere declarations by the insured in his application, as to his future intentions, and his failure to carry out his declarations, or to comply with his intentions as to his future con-

¹⁷ The statement of facts is abridged from that in the official report.

duct, sufficient to work subsequent forfeiture of the policy? In no part of the application did the assured covenant that he would not practice any pernicious habit. Nor did he promise, agree or warrant not to do so. He declared that he would not. To declare, is to state; to assert; to publish; to utter; to announce; to announce clearly some opinion or resolution; while to promise is to agree; "to pledge one's self; to engage; to assure or make sure; to pledge by contract."—Worcester. There is no clause in the policy which provides that if the assured shall practice any pernicious habit tending to shorten life, the policy shall ipso facto become void. There is only the stipulation that, "if any of the statements or declarations made in the application * * * shall be found in any respect untrue, this policy shall be null and void." This evidently referred to a state of things existing at the time the policy was issued.

As to such matters, as I have already said, there was no untrue statement. But the assured declared, as a matter of intention, that he would not practice any pernicious habit. Was this declaration of future intention false? There is no allegation, much less proof, that it was so. The assured might well have intended to adhere to his declaration in the most perfect good faith, yet in a moment of temptation have been overcome by this insidious enemy. In the absence of any clause in the policy avoiding it in case the assured should practice any such habit, and of any covenant or warranty on his part that he would not do so, we do not think his mere declaration to that effect in the application sufficient to avoid the policy.

The judgment is reversed, and judgment is now entered in favor of the plaintiff and against the defendant for the sum of \$1,500, with interest from June 26, 1876.¹⁸

PORT BLAKELY MILL CO. v. SPRINGFIELD FIRE & MARINE INS. CO.

(Supreme Court of Washington, 1910. 56 Wash. 681, 106 Pac. 194, 28 L. R. A. [N. S.] 593.)

Action by the Port Blakely Mill Company and the Detroit Trust Company against the Springfield Fire & Marine Insurance Company. From a judgment for plaintiffs, defendant appeals.

MORRIS, J.¹⁹ Action upon a fire insurance policy written by appellant, insuring the property of the mill company against loss by fire in the sum of \$10,000, with loss, if any, payable to the Detroit Trust Company. The policy was in the usual form, except that it had attached to it a rider containing a description of the property insured,

¹⁸ Compare *Schultz v. Mutual Life Ins. Co.* (C. C.) 6 Fed. 672 (1881) and *Northwestern Masonic Aid Ass'n v. Bodurtha*, 23 Ind. App. 121, 53 N. E. 787, 77 Am. St. Rep. 414 (1899).

¹⁹ Part of the opinion is omitted.

and various special agreements with reference to the particular risk. On April 22, 1907, a fire occurred, whereby a portion of the insured property was damaged. The appellant, contending that the policy had been avoided by the failure of the mill company to observe one of the special agreements, claimed to be a "warranty," denied its liability, and this action was instituted to enforce payment, resulting in findings in favor of respondents, and a judgment in the sum of \$6,452.90, with interest from July 15, 1907, from which this appeal was taken.

Three contentions are made by applicant, upon which we are asked to reverse the judgment:

(1) That the Detroit Trust Company may not maintain an action within this state, not having paid an annual license fee nor otherwise complied with the provisions of our laws in regard to foreign corporations doing business within this state.

(2) That the policy was avoided by the breach of a warranty therein contained.

(3) That an automatic sprinkler system connected with the mill plant was not in working order at the time of the fire.

Each of these contentions has been considered, but, having reached a conclusion upon the second which is determinative of the appeal, we will not discuss the first and third. The clause in the policy which suggests the second assignment of error is as follows: "Warranted by the insured that due diligence be used that the automatic sprinkler system shall at all times be maintained in good working order."

The Port Blakely Mill Company was what is known in insurance circles as "a sprinkler risk," and the evidence discloses that the rate of premium upon "a sprinkler risk" was approximately 50 per cent. less than upon the same mill without the sprinkler attachment. So that, by the maintenance of the sprinkler system and the insertion in the policy of the clause above referred to, the mill company obtained this policy upon the payment of \$229 premium, which otherwise would have cost it approximately \$458. It is apparent, therefore, that both parties had fully in mind at the time of the issuance of the policy the advantages that would result to each because of the existence of the sprinkler system, and the use of due diligence on the part of the insured to maintain it in good working order at all times. To the insured it meant a saving of \$229 on the premium paid, to the insurer it meant a lessening of its risk, ample consideration to each why this particular form of policy should be chosen, and the sprinkler clause made a part thereof; and, having in mind this situation, it is not unreasonable to assume that the words used in the sprinkler clause were employed by both parties with a full understanding that it was a statement and assumption of condition and undertaking on the part of the insured, relating to the risk and affecting its character and extent.

While, as is said by Shaw, C. J., in *Daniels v. Hudson River Fire Ins. Co.*, 12 Cush. (Mass.) 416, at page 423 (59 Am. Dec. 192), "there

is undoubtedly some difficulty in determining by any simple and certain test what propositions in a contract of insurance constitute warranties;" and conceding the leaning of the courts, in order to protect the insured and avoid a forfeiture, is to hold agreements and stipulations in the policy to be representations rather than warranties in all cases where there is any room for construction, it has nevertheless become fixed and settled, except in so far as it may have been changed and modified by statute in some of the states, that all statements regarding the risk contained in or appearing on the face of the policy are warranties. Cooley's Briefs on the Law of Insurance, p. 1133. And such is the rule irrespective of the use of the word "warranty" or "warranted." *Redman v. Hartford Ins. Co.*, 47 Wis. 89, 1 N. W. 393, 32 Am. Rep. 751; *Wood v. Hartford Ins. Co.*, 13 Conn. 534, 35 Am. Dec. 92; *Moulor v. Am. Life Ins. Co.*, 111 U. S. 341, 4 Sup. Ct. 466, 28 L. Ed. 447; *Barnard v. Faber*, L. R. 1 Q. B. 340.

Wood on Fire Insurance, at page 449, says: "The rule seems to be that such representations in or a part of the policy are construed to be warranties when it appears to the court that they have had in themselves, or in the view of the parties, a tendency to induce the company to enter into the contract on terms more favorable to the insured than without them. * * * Any statement or description of any undertaking on the part of the assured on the face of the policy which relates to the risk is a warranty, an express warranty. * * * It is not necessary that it should be stated to be a warranty, or that it should be so by construction. It is enough that it appears upon the face of the policy and relates to the risk."

The case before us would undoubtedly fall within such a rule as Mr. Wood refers to, when it appears that the premium on this policy upon a "sprinkler risk," and with the sprinkler clause added was reduced approximately 50 per cent. of what it would have been otherwise. This was certainly in his language "a tendency to induce the company to enter into the contract on terms more favorable to the insured than without them." In *Wood v. Hartford Ins. Co.*, supra, the court says: "The general rule in regard to what constitutes a warranty in a contract of insurance is well settled. Any statement or description or any undertaking on the part of the insured on the face of the policy which relates to the risk is a warranty. * * * When it is once ascertained that it relates to the risk and was inserted in reference to that, it must be strictly observed and kept or the insurance is void." To our minds the conclusion, both upon reason and authority, is that the clause in question was and is a warranty.

Having reached this conclusion, there is but one other question to be considered: Was there a breach of this warranty? It is undisputed that from April 1st to April 21st the sprinkler system in what was known in the mill as "No. 3" was disconnected. The fire occurred on April 22d, and there is a sharp conflict in the testimony as to whether or not No. 3 was in operation at the time of the fire. But, giving due

weight to the finding of the court below that it was connected upon April 21st, there was a period of nearly three weeks when it is admitted that no protection was accorded by the sprinkler system in No. 3. The repairs undertaken by the mill during this time were permissible under the policy, but it appears that it was the work of only a few hours to disconnect system No. 3 from its old location and move it to its new. Such being the fact, it was not "due diligence," as called for in the policy, for the mill company to continue the operation of the mill without the protection of sprinkler system No. 3. It was an undoubted and material increase in the risk, contrary to the terms of the warranty, and was a breach thereof. The mill company, having broken its contract of warranty by the failure to use due diligence in maintaining the sprinkler system at all times in good working order, by such failure released the appellant from liability under the policy, and the same thereby was avoided. So that whether or not the system in No. 3 was in good working order on April 22d is immaterial, since the policy, because of the breach of the warranty, was not then in force or effect. And it was likewise immaterial whether or not this breach contributed to the loss. The policy, being at an end because of its broken warranty, no longer covered any loss or damage to the mill property, and was wholly avoided. * * * Reversed.

VI. Warranties Distinguished from Representations ²⁰

VIVAR v. SUPREME LODGE KNIGHTS OF PYTHIAS.

(Supreme Court of New Jersey, 1890. 52 N. J. Law, 455, 20 Atl. 36.)

Action by Emily L. Vivar on certificates of membership in the Endowment Rank of the Order of Knights of Pythias, whereby the life of Darius Vivar was insured. On the trial verdict was directed for plaintiff, and defendant took a rule to show cause why the verdict should not be set aside.

DIXON, J.²¹ * * * The next ground on which the defendant seeks a new trial is that although Vivar, in his application for membership in the Endowment Rank, in response to the question, "State definitely to whom you wish the benefit made payable, and relationship to you," had answered, "To my wife, Emily Louisa Vivar," and although by the certificates sued on the sums insured were made paya-

²⁰ For discussion of principles, see Vance on Insurance, §§ 106, 107. See, also, Cooley, Briefs on the Law of Insurance, vol. 2, p. 1120; vol. 3, p. 1926.

²¹ Part of the opinion is omitted and the statement of facts is rewritten.

ble to "Emily Louisa Vivar, his wife," yet the trial judge rejected evidence offered by the defendant to show that, before and at the time of the plaintiff's marriage to Vivar, he had a lawful wife living, and both he and the plaintiff knew it. The defendant, while admitting that the plaintiff is the person intended by the contract, yet insists that her being Vivar's lawful wife was made a condition of the obligation: that, as a part of the contract, Vivar warranted the existence of such relationship.

By the terms of the certificates, the application forms part of the contract. Nevertheless the statements contained in it are not necessarily, for that reason, warranties. In order to have the force of a warranty, the statement must, indeed, constitute part of the contract: but whether even such a statement should be deemed a warranty depends upon the just construction of the entire agreement. Courts do not favor warranties by construction, and hence parties will not be held to have entered into the contract of warranty unless they clearly appear to have intended it. If the contract refers to statements contained in another paper for some other purpose than to give them the force and effect of warranties,—for instance, if it refers to them as "representations,"—or if the purpose is doubtful, such reference will not convert the statements into warranties. Of themselves, statements in the application are mere representations, and they will not become conditions or warranties, unless the parties plainly evince an intention to make them such, either by so denominating them, or by declaring the validity of the contract to depend upon their literal truth. *May, Ins. §§ 158-165; Insurance Co. v. Day*, 39 N. J. Law. 89, 23 Am. Rep. 198. Even calling the statements warranties will not make them such, when other terms in the contract indicate a different understanding. *Fitch v. Insurance Co.*, 59 N. Y. 557, 17 Am. Rep. 372; *Anders v. Supreme Lodge*, 51 N. J. Law, 175, 17 Atl. 119.

Under these rules, the statements in the application now before us are not warranties. The certificates do not so designate them, but, on the contrary, style them "representations;" and in making them part of the contract must be deemed to incorporate them as representations. Nor is there in the contract any provision to the effect that, if they be false or untrue or inaccurate, the insurance will be void. The clause at the end of the certificates "that any violation of the within mentioned conditions * * * shall render the certificate and all claims null and void," must be understood as referring to matters which, by other parts of the contract, are made conditions, and cannot of itself create a condition out of what had been before mentioned as a representation only. The trial court, therefore, properly held that the statement concerning the relationship between Vivar and the plaintiff was not a warranty.

It remains, however, to determine what effect it should have upon the contract, if considered as a representation untrue to the knowledge of the insured; for to that extent was the defendant's offer of proof.

In order to invalidate a contract, a representation made during the negotiations must not only be willfully untrue, but must also be material, or, at least, must appear to have been thought material, by the party to whom it was made. * * *

If the representation made, though known by the insured to be false, did not differ from the truth in any respect which was, either in fact or in the view of the insurer, material to the contract, then the falsehood did not mislead the insurer, or induce the contract, and should not be allowed to avoid it.

Usually, the materiality of a representation will be inferred from the fact that it was made pending the negotiations, in response to a specific inquiry by the insurer; but this rule is not universal; for the purpose of the inquiry must be considered, to see whether the information is sought to aid the insurer in fixing the terms on which he will contract, or with an entirely different object. Thus, if a mutual insurance company should require its premiums to be paid within a definite time after the mailing of notice addressed to the residence of the insured, and with this rule in view should require every applicant for insurance to state his residence in his application, and an applicant should give as his residence, not the truth, but the place where he ordinarily received his mail, it would seem absurd to hold that such circumstance could invalidate the contract.

In the present case, the inquiry related merely to the payee of the money for which the insurer was to become responsible, and by the very terms of the contract subsequently made the insurer expressly left the designation of the payee to the absolute discretion of the insured; the language of the certificates being that the supreme lodge will pay the sum insured to "Emily Louisa Vivar, his wife, as directed by said brother [Vivar] in his application, or to such other person or persons as he may subsequently direct by will or otherwise." A similar power is given to the insured by article 9 of the constitution of the rank. It seems manifest that a subject thus committed to the control of the insured was not material to the contract of the insurer, nor so regarded by the insurer; and that, if Vivar had declared Emily Louisa Vivar to be not related to him, as the lodge now alleges the truth to have been, the contract would have been made on precisely the same terms as at present. While, therefore, the fact that the question was put might justify an inference that relationship between the payee and the member was thought material, yet the express terms of the certificates, and the provisions of the constitution, force the conclusion that it was not. In this respect the Endowment Rank of the Knights of Pythias differs from those benevolent societies which are organized for the benefit of members and their families solely, and with regard to which it has been properly held that the relationship of the payee is material. *Supreme Council v. Green*, 71 Md. 263, 17 Atl. 1048, 27 Am. St. Rep. 527; *American Legion v. Smith*, 45 N. J. Eq. 466, 17 Atl. 770.

The defendant further insists that the relationship was made material by the legal necessity that the beneficiary should have an insurable interest in the life insured. In New Jersey, the tendency of judicial opinion seems to be in favor of the proposition that the assured need not have an interest in the life insured, in order to support the contract of insurance. *Insurance Co. v. Johnson*, 24 N. J. Law, 576; *Martin v. Insurance Co.*, 38 N. J. Law, 140, 20 Am. Rep. 372. Elsewhere contracts of insurance without such an interest are generally condemned, as being contrary to public policy; yet even in those jurisdictions the ordinary rule appears to be that when a person effects an insurance on his own life, and in the policy designates another person as payee of the sum insured, the latter may maintain an action on the policy without showing an insurable interest in the life. *Campbell v. Insurance Co.*, 98 Mass. 381; May, Ins. § 112.

In view of the opinions heretofore expressed in this court, we should apply this rule to the present case, and hold that an insurable interest in the payee of these certificates was not requisite, and that consequently her relationship to Vivar did not become material on that ground. Our conclusion is that the relationship of Vivar to the plaintiff was not material to the contract, either in fact or in contemplation of the insurer, and that, therefore, the falsity of Vivar's statement regarding it could not invalidate the insurance.

The last reason urged for a new trial is that Vivar in his application misstated his age. There was, however, no testimony produced at the trial which would warrant a finding to that effect.

On the whole, we think that justice was done by the verdict, and that the rule to set it aside should be discharged.²²

LYNCH v. PRUDENTIAL INS. CO. OF AMERICA.

(Court of Appeals of Missouri, 1910. 150 Mo. App. 461, 131 S. W. 145.)

Action by Maggie Lynch against the Prudential Insurance Company of America. Judgment for plaintiff. Defendant appeals.

NORTON, J.²³ * * * Defendant, * * * on the 23d day of July, 1907, issued its policy of insurance in the amount of \$1,000 on the life of Michael J. Lynch, payable in event of his prior death to his wife, Maggie Lynch, the plaintiff. About six months thereafter, January 29, 1908, the insured died as a result of paresis while insane, and, though proofs of his death were duly made, defendant declined and refused to pay the policy, asserting that it was obtained through

²² Compare *Gaines v. Fidelity & Casualty Co. of New York*, ante, p. 214. See, also, as to distinction between warranties and representations, *Alabama Gold Life Ins. Co. v. Johnston*, 80 Ala. 467, 2 South. 125, 59 Am. Rep. 816 (1887).

²³ Part of the opinion is omitted.

misrepresentation and fraud, and, further, that there was a breach of warranty in respect of a condition contained in the policy to the effect that the insurance should not become effective unless the insured was in sound health at the time the policy was issued.

This suit having been instituted on the policy, defendant answered thereto by interposing three affirmative defenses, which will be noticed in their order. For its first defense, it is averred that at the time of making application to it for the insurance the insured stated therein that he was in good health, and that he had never been attended by a physician, and that he had never suffered from insanity; that, relying upon the truth of said statements, defendant contracted the insurance involved, which, but for its belief in the truth of the statements aforesaid, would not have been issued.

It is averred, too, that each and all of said statements were misrepresentations of fact on the part of the insured, in that he was not then in good health, but was suffering from a disease known as paresis, or softening of the brain; that the insured had been attended by a physician prior to the date of his application, and was then under the care of a physician; and that he had suffered and was then suffering from insanity. It is further averred that the said disease, from which insured represented he had never suffered, and for which he had been attended by physicians, and which at the time rendered his health unsound, directly contributed to and occasioned his death on January 29th thereafter, while in the insane asylum. Wherefore it is said the matters so misrepresented by insured to defendant actually contributed to the event on which the policy became due and payable, and that said misrepresentations were therefore material, and rendered the policy void and of no effect. Defendant also tendered all of the premiums which had been paid on the policy. * * *

It may be conceded the testimony shows conclusively that the insured had been waited upon by two physicians recently before the insurance was effected; but there is no word in the proof tending to show from what malady he then suffered, if any, and for what he was treated, if treated at all, by those physicians. The mere fact that the application contained a false statement with respect to the matter that insured had not been treated by a physician and was in sound health is not sufficient to render the policy void under our statute, unless it appears he was treated for the disease which afterwards occasioned his death. Such a misrepresentation is not a warranty, under our insurance law as modified by the rule of the statute, and is wholly immaterial, unless it was made with respect to a fact which actually contributed to the contingency or event on which the policy is to become payable. Even then, the question whether such representation concerned a matter which did so contribute is one for the jury under the positive mandate of the statute.

The statute referred to is as follows: "No misrepresentation made in obtaining or securing a policy of insurance on the life or lives of

any person or persons, citizens of this state, shall be deemed material, or render the policy void, unless the matter misrepresented shall have actually contributed to the contingency or event on which the policy is to become due and payable, and whether it so contributed in any case, shall be a question for the jury." Section 7890, Rev. St. 1899 (section 7890, Ann. St. 1906). See, also, the following authorities in point: *Schuermann v. Union Cent. Life Ins. Co.*, 165 Mo. 641, 65 S. W. 723; *Keller v. Home Life Ins. Co.*, 198 Mo. 440, 95 S. W. 903; *Salts v. Prudential Ins. Co.*, 140 Mo. App. 142, 120 S. W. 714; *Burns v. Met. Life Ins. Co.*, 141 Mo. App. 212, 124 S. W. 539; *Ashford v. Met. Life Ins. Co.*, 98 Mo. App. 505, 72 S. W. 712; *Christian v. Connecticut Mut. Life Ins. Co.*, 143 Mo. 460, 45 S. W. 268; *Cooley's Briefs on Insurance*, vol. 3, pp. 1989, 1990.

The second defense relied upon sets forth a warranty, which, it is asserted, is contained in the application, and a condition of the policy, together to the effect that, unless the insured was in sound health at the time of issuing the policy, it should not take effect. A breach of this warranty is alleged, and defendant prays to be discharged on that account. The court declined to deal with this matter of a breach of warranty, and refused an instruction drafted on the theory that the insured had warranted his good health in the application. This was entirely proper; for it has been many times decided that the statute quoted abrogates the distinction which obtained at common law as between warranties and representations in life insurance contracts, and relegates matters which were theretofore regarded as warranties to the same plane as that occupied by representations. *Jenkins v. Covenant Mut. Ins. Co.*, 171 Mo. 375, 71 S. W. 688; *Keller v. Home Life Ins. Co.*, 198 Mo. 440, 95 S. W. 903; *Jacobs v. Omaha Life Ass'n.* 146 Mo. 523, 48 S. W. 462; *Salts v. Prudential Ins. Co.*, 140 Mo. App. 142, 120 S. W. 714. See, also, *Schuermann v. Union Cent. Life Ins. Co.*, 165 Mo. 641, 65 S. W. 723.

In a recent case a similar matter was invoked as a warranty, and we declared the statute applied to the conditions and stipulations in the policy to the effect that it should not take effect unless the insured was in good health at the time, as well as to misrepresentations in the application. In either case the influence of the statute is the same; for the public policy of the state, as declared in the statute, is not to be thus indirectly evaded. Though the condition in the policy based on the misrepresentation in the application would amount to a warranty prior to the statute, it must now be regarded as within its influence, and no longer possessed of the force of a warranty, unless the fact of poor health at the time actually contributed to the death of the insured. *Salts v. Prudential Ins. Co.*, 140 Mo. App. 142, 120 S. W. 714. See, also, *Burns v. Met. Ins. Co.*, 141 Mo. App. 212, 124 S. W. 539.

Under the instructions given for both plaintiff and defendant by which the first defense was submitted, the verdict for plaintiff affirmed

either that the insured was in good health at the time the insurance was effected, or that, if he was not in good health and had been visited by physicians, his then condition in no way contributed to his death or the event upon which the policy became payable. This verdict responded to the true issue under the law, and the court very properly declined to treat with the second defense on the basis of a warranty; for the doctrine no longer obtains with us in life insurance matters, unless the matter said to be warranted becomes material by contributing to the event which renders the policy payable.

The third count of defendant's answer presents the matter of willful fraud on the part of both the insured and his wife, the plaintiff, in obtaining the insurance, and prays that the policy be declared void for that reason. It first avers the insured obtained the insurance by misrepresenting the facts which have been heretofore detailed as to his condition; that he made said representations for the fraudulent purpose of concealing from defendant the true state of his health, etc., in order to obtain the insurance; that the plaintiff, his wife, at the time knew of the insured's impaired condition of health, and fraudulently aided and abetted him in procuring the insurance, etc. The court declined to consider this matter, otherwise than as within the influence of our statute above quoted, and we believe this was proper, for, after the death of the insured, the rule of the statute obtains alike with respect to willful fraud and mere misrepresentations. So much has been expressly decided, and the distinction theretofore sharply made and pointed out overruled.

In *Ashford v. Insurance Co.*, 80 Mo. App. 638, and *Van Cleave v. Union Casualty, etc., Co.*, 82 Mo. App. 668, the Kansas City Court of Appeals declared that matters of willful fraud in obtaining the policy were beside the statute, and might be pleaded in bar to an action thereon. But the doctrine was repudiated by the Supreme Court in *Kern v. Sup. Council Am. Legion of Honor*, 167 Mo. 471, 486, 487, 488, 489, 67 S. W. 252, and the authority of those cases on this question expressly overruled. In one of the same cases, on a second appeal (see *Ashford v. Met. Life Ins. Co.*, 98 Mo. App. 505, 72 S. W. 712), the Kansas City Court of Appeals receded from its former position, and in obedience to the ruling of the Supreme Court held that, in a suit on the policy after the death of the insured, matters of willful fraud in obtaining its issue are to be treated as immaterial, unless the fraud relied upon actually contributed to the cause of death. So the doctrine now obtains to the effect that, though the fraud practiced in obtaining the insurance is willful and designedly done, if it consists in matter of fact inducing the issue of the policy, it will be regarded as a material defense in a suit on the policy only when it appears to have been about a matter which actually contributed to the cause of death.

Mr. Cooley, in his work on Insurance, thus states the Missouri doctrine: "In *Klostermann v. Germania Life Ins. Co.*, 6 Mo. App. 582,

the court seems to have taken the position that the Missouri statute, which provides that an untrue statement shall not defeat the policy, unless it relates to a matter contributing to the loss, would apply, whether the statements were made fraudulently or in good faith. But in *Ashford v. Metropolitan Life Ins. Co.*, 80 Mo. App. 638, the court held that the statute would not apply if the representations were willful or fraudulent, calling attention to *White v. Insurance Co.*, 29 Fed. Cas. 1011, in which the Missouri statute was construed, and wherein Judge Dillon expressed the opinion that willful or fraudulent misrepresentations would not come within the operation of the statute. Following the *Ashford* Case, the court, in *Van Cleave v. Union Casualty & Surety Co.*, 82 Mo. App. 668, held that a willful misrepresentation would avoid the policy, if it related to a fact made material by the agreement of the parties. Similarly it was said, in *Summers v. Metropolitan Life Ins. Co.*, 90 Mo. App. 691, that the statute did not do away with the defense of actual fraud. The doctrine of the *Ashford* and *Van Cleave* Cases has, however, been overruled in later cases. Thus, in *Schuermann v. Union Central Life Ins. Co.*, 165 Mo. 641, 65 S. W. 723, the court, while conceding that the statute did not restrain the power of a court of equity to relieve against actual fraud, regarded the plea that the applicant knowingly made untrue statements as a legal, and not an equitable, defense, thus practically announcing the rule that the statute must operate, even if the misrepresentation is willful. The rule was subsequently reiterated in *Kern v. Supreme Council American Legion of Honor*, 167 Mo. 471, 67 S. W. 252. On the authority of these cases it was held, in *Ashford v. Metropolitan Life Ins. Co.*, 98 Mo. App. 505, 72 S. W. 712, overruling the decision in 80 Mo. App. 638, that a willfully false statement was no defense to the policy, if it related to a matter not contributing to the death of the insured."

It seems the Supreme Court recognizes the authority of a court of equity to cancel the policy before it has become payable by the happening of the event insured against on the grounds of willful fraud, which generally obtain in the law apart from the statute, but adheres to the doctrine that after the death of the insured the liability of the company and its right to be relieved from the obligation of the policy, though fraudulently induced, is to be determined under the rule of the statute. *Schuermann v. Union Cent. Life Ins. Co.*, 165 Mo. 641, 65 S. W. 723. Indeed, in the case cited, the defendant appealed to the chancellor for a cancellation of the policy on the grounds that the insurance was obtained by the insured through false statements and representations known to him at the time to be untrue, by incorporating a count to that effect in its answer to a suit on the policy, and the court denied the right to such relief after the cause of action on the policy had accrued. The averments of the answer in that case as reported import fraud

in the inducement, but do not disclose the representations to have been material within the purview of the statute.

On this question a most recent case may be cited as directly in point. A study of defendant's refused instruction No. 2 in *Keller v. Home Life Ins. Co.*, 198 Mo. 440-453, 95 S. W. 903, and the remarks of the court therein (page 462 of 198 Mo., and page 909 of 95 S. W.), will reveal the thought and an application of the doctrine.

It is entirely clear that under the authorities the only fraud of the insured, Michael J. Lynch, in obtaining the insurance, available to defendant in a suit on the policy, to the end of relieving it of liability, is such fraudulent statements as he may have made, which induced it to issue the policy, and are material because they concerned a matter which contributed to his death. * * * Affirmed.²⁴

²⁴ Compare *Mutual Life Ins. Co. of New York v. Mullen*, ante, p. 211. See, also, Cooley, *Briefs on the Law of Insurance*, vol. 2, p. 1189; vol. 3, p. 1983.

INSURANCE AGENTS AND THEIR POWERS

I. The Doctrine of Agency in Insurance Law¹

1. IN GENERAL

BALDWIN v. CONNECTICUT MUT. LIFE INS. CO.

(Supreme Judicial Court of Massachusetts, 1903. 182 Mass. 389, 65 N. E. 837.)

Action by Frank E. Baldwin, as administrator, against the Connecticut Mutual Life Insurance Company. There was judgment for defendant, and plaintiff brings exceptions.

KNOWLTON, C. J.² The plaintiff seeks to recover \$10,000 on an alleged oral contract of the defendant to insure the life of his intestate. He introduced evidence tending to show that one Cooper was the general agent of the defendant company for Western New York, who resided and had his place of business at Syracuse, in that state; that Alvi T. Baldwin, a brother of the plaintiff, lived in Maysville, N. Y., doing business in Rochester, and knew Cooper several years as a life insurance agent in Syracuse; * * * that in September, 1894, the brother met Cooper at the office of the Baldwin Bros. Company in Boston, and then introduced him to the plaintiff's intestate, to the plaintiff, and to others, as the general agent of the Connecticut Mutual Life Insurance Company. * * * Cooper stated to those present "that he had come from Syracuse for the purpose of being introduced and writing insurance for the Connecticut Mutual Life Insurance Company." The plaintiff's evidence tended further to show that the plaintiff's intestate, the plaintiff, and one Daggett made applications for insurance in the defendant company on that day. * * * The witnesses also testified that Cooper told them that they were insured from the time they signed the applications. None of them was examined by a physician until the next day, when a medical examination of each was made. The application of the plaintiff's intestate was sent to the defendant company, but before any policy was made he died. The suit is brought on the alleged agreement of the agent that the plaintiff's intestate was insured from the time of his signing the application.

The defendant sets up a variety of defenses. It says first that there was no evidence that Cooper had authority to bind it by such an oral

¹ For discussion of principles, see Vance on Insurance, § 108. See, also Cooley, Briefs on the Law of Insurance, vol. 1, p. 345 et seq.

² Part of the opinion is omitted.

contract for insurance without a payment of money or an examination by a physician. It invokes St. 1894, c. 522, § 3, which makes it "unlawful for any company to make any contract of insurance upon * * * lives in this commonwealth, or with any resident thereof, or for any person as insurance agent or insurance broker to make, negotiate, solicit or in any manner aid in the transaction of such insurance, unless and except as authorized by the provisions of this act"; also section 65 of the same chapter, which forbids life insurance companies to make any "insurance, guaranty, contract or pledge in this commonwealth * * * which does not distinctly state the amount of benefits payable, the manner of payment, and the consideration therefor"; also section 68, which provides that "no life insurance company doing business in Massachusetts shall * * * make any contract of insurance or agreement as to such contract other than as plainly expressed in the policy issued thereon"; also section 68, which forbids life insurance companies and agents paying or allowing, "as an inducement to insurance, any rebate of premium payable on the policy, or any special favor or advantage in the dividends, or other benefit to accrue thereon, or any valuable consideration or inducement whatever, not specified in the policy contract of insurance"; also, sections 77, 78, and 84 of this chapter, which severally provide in very plain terms that foreign insurance companies shall not do business in this commonwealth otherwise than through an agent or agents who are residents of the commonwealth. These statutory provisions are now found in Rev. Laws, c. 118.

The defendant, in answer to interrogatories, after saying that Cooper was its general agent for Western New York, added that he "had a license to solicit life insurance in Massachusetts." This we understand to mean that he was permitted or licensed by the defendant to solicit life insurance in Massachusetts, and not that he had any license from the authorities here. Upon the plaintiff's testimony and the admitted facts, he was not a resident of this commonwealth, but resided in Syracuse. Under the statute, therefore, he could not legally represent the defendant as its agent to make a contract of life insurance in this commonwealth. If he made such an oral contract as the plaintiff contends, it was an illegal contract, which cannot be enforced. In this respect the case comes within the decisions in *Claflin v. System Co.*, 165 Mass. 501, 43 N. E. 293, 52 Am. St. Rep. 528, and *Insurance Co. v. Sawyer*, 160 Mass. 413, 36 N. E. 59.

It is unnecessary to consider the other defenses relied on by the defendant under the statutes above referred to. It is proper, however, to add that in another particular the plaintiff fails to prove his case. There is no evidence of authority on the part of Cooper, except the fact that he was the defendant's general agent for Western New York, and that it also permitted him to solicit insurance in Massachusetts. In no way did the defendant hold him out as having authority beyond that which was to be inferred from these facts. His acts and declara-

tions at the time or subsequently are not competent evidence to prove his authority. Nor is there any inference that a general agent of a life insurance company for a particular territory has authority to represent the company in other territory, which presumably is assigned to another general agent, or is retained by the company in its own management. It is well known that life insurance companies transact business over very large areas, some of them in all the states of this country and in different foreign countries. A general agent for a specified area is not expected to exercise authority in the territory of another general agent. There is nothing in this case to indicate that Cooper had any more power to bind the company in Massachusetts than an ordinary soliciting agent. The language of the application signed by the plaintiff's intestate, and the policy of insurance in evidence, issued by the defendant to another person, as well as the general practice of life insurance companies, tend to show that an ordinary solicitor of a life insurance company has no authority to make such unusual contract as an oral agreement for life insurance to take effect immediately, before there is a medical examination, and without a payment of the premium otherwise than by a promissory note. We do not intimate that the term "general agent," as applied to representatives of life insurance companies, implies such an authority to represent the company as would cover the making of a contract of this kind, apart from the statutory restrictions.

We are of opinion that there was no evidence that Cooper was authorized to bind the defendant by the alleged oral contract made in Massachusetts. Exceptions overruled.

2. APPARENT POWERS

RUGGLES v. AMERICAN CENT. INS. CO. OF ST. LOUIS.

(Court of Appeals of New York, 1889. 114 N. Y. 415, 21 N. E. 1000, 11 Am. St. Rep. 674.)

Action by James H. Ruggles against the American Central Insurance Company, upon an alleged contract of fire insurance. Judgment for plaintiff, and defendant appeals.

BROWN, J.* * * * A more serious question is presented as to whether the agreement thus made was binding upon the company. At the close of the testimony the counsel for the defendant asked the court to dismiss the complaint, upon the ground that it appeared that the letter appointing Sedgwick & Hammond agents for the defendant limited them against insuring special risks. * * *

* Part of the opinion is omitted.

The request to charge that, if the jury should determine that the risk was special, the defendant was not liable, raised no other or different question than that presented by the motion to dismiss the complaint, as the risk was conceded to have been a special one, and the jury would have been bound so to find. The request was, therefore, equivalent to asking for a direction of a verdict for defendant. The point of the appellant's contention was that the court should have decided upon the letter which contained the agents' delegation of authority that they possessed no power to bind the defendant upon a special risk; and this question is the most serious one presented upon this appeal. It may be conceded that the commission of authority had not, at the time of making the agreement, reached the agents. It had, however, been mailed from St. Louis, as the letter of the secretary of the company, dated October 13th, refers to it as having been forwarded by mail on that day. It may also be conceded that it did not reach the agents until October 20th, the day after the fire, as Hammond in his letter to the plaintiff, under date of October 21st, speaks of the agents not having power to bind the company, "until yesterday," and Sedgwick testified that the two letters introduced in evidence were the only communications they had received from the company with reference to their acting as agents prior to the fire, which occurred on October 19th. The evidence upon the question of power is, therefore, to be found entirely in the two letters last mentioned.

The first of these letters bears date October 11th, and was written to Sedgwick & Hammond by Mr. Van Valkenburgh, a general agent of the company. In it he says: "If your appointment is confirmed, your jurisdiction will be the city of Brooklyn, outside the shore line; but we shall expect you to write no large risks for us until you know for certain that we are not on, through our New York office. As we are now on all Brooklyn specials of any size that we will write, please do not undertake to write any specials for us at present." The second letter was written by the secretary of the company from St. Louis, dated October 13th, and addressed to Sedgwick & Hammond. It states: "We take very great pleasure in forwarding to your address by mail to-day a commission of authority as agents of this company in the city of Brooklyn. We deem it unnecessary to enter into any detailed instructions as to the conduct of our business at your agency, as our Mr. Van Valkenburgh has written you upon that subject," etc. Whatever authority the agents had, they derived from these letters. The risk was a special one, and so admitted by the plaintiff upon the trial.

Was authority to insure such a risk withheld from the agents? We do not so interpret the letters. It is true that Van Valkenburgh wrote that the agents should not write any large risks until they knew that the company was not on, through their New York office, and should not undertake to write any specials for the company, but this limited authority is not confirmed in the letter from the company. In that

letter the authority is broadly stated to be "agents of this company in the city of Brooklyn." There was no exception in the territory named, nor limitation as to the character of the risks to be insured. The other expression in the letter, that "we deem it unnecessary to enter into any detailed instructions as to the conduct of our business at your agency, as our Mr. Van Valkenburgh has written you upon that subject," does not in any way limit the agents' power. Its plain reference is to the manner of conducting the business, and not to the authority to be exercised by the agent. That this view is the one entertained by the agents is plain from Hammond's letter to the plaintiff, under date of October 21st, in which he places his denial of the existence of an agreement to insure on the fact that they had not, at the date of the alleged agreement, received their commission of authority, and not at all upon the ground that such a contract was in excess of their power.

We think, therefore, that the letter of October 13th, fairly interpreted, constituted Sedgwick & Hammond general agents of the company, and that the utmost that could be claimed from the direction contained in Van Valkenburgh's letter, which I have quoted, was that they were instructions for the guidance of the agent, which would in no way affect contracts with third parties having no notice or knowledge of such instructions. A general agent may bind his principals by an act within the scope of his authority, although it may be contrary to his special instructions. Story, Ag. § 733; Walsh v. Insurance Co., 73 N. Y. 5; Lightbody v. Insurance Co., 23 Wend. 18; Angell v. Insurance Co., 59 N. Y. 171, 17 Am. Rep. 322. In Walsh v. Insurance Co. the rule is stated as follows: "Nor would restriction upon the power of an agent, not known to persons dealing with him, limiting the usual powers possessed by agents of the same character, exempt the principal from responsibility for his acts and contracts which were within the ordinary scope of the business intrusted to him, although he acted in violation of special instructions." Lightbody v. Insurance Co. was a case very similar to the case under consideration. The plaintiff owned property in Utica, upon which he procured insurance in the defendant company by parol agreement with an agent in Troy, whose authority was limited to "Troy and vicinity," and who was denied the power to insure special risks. The plaintiff's property was a special risk. The supreme court held the agreement to be binding on the defendant, Bronson, J., saying: "Although he [the agent] must answer to his principals for departing from their private instructions, he clearly bound them so far as third persons dealing with him in good faith are concerned."

The manner of conducting the business of insurance is so well known that a person may reasonably assume that one having the apparent power of a general agent is not limited by his instructions as to the class of risks he may insure. Corporations organized under the laws of other states, and having their general officers in those states,

do business in this state through agents who are intrusted with policies signed by the officers of the company, and which become binding contracts upon the indorsement of the agent. Such agents have power to make original contracts of insurance, and this mode of conducting the business is so well established that it has become a part of the common knowledge of the community, and judicial notice must be taken of it. *Ellis v. Insurance Co.*, 50 N. Y. 406, 407, 10 Am. Rep. 495. Persons dealing with such agents in good faith have the right to assume that they possess the power usually exercised by that class of officers; and, unless the limitation on their authority is brought to their knowledge, the contracts made with them will be binding upon the company. *Walsh v. Insurance Co.*, *supra*.

There was nothing in the transaction between Barker and Hammond, as shown by the evidence, from which the court could assume that Barker had any notice of any limitation on the agents' power. At the time of making the agreement, Hammond showed him a letter from the company, and it having been proven by Sedgwick that, prior to the fire, but one letter from the company was received, it must be assumed that the letter shown was that of October 13th. As I have already shown, this letter constituted Sedgwick & Hammond the general agents for the city of Brooklyn, and no one in reading it could have supposed that, by the reference to the Van Valkenburgh letter, the company intended to place any limitation upon the agents' power, but that the direction contained therein related to the manner of conducting the company's business at the agency. We think the contract made with Hammond was, therefore, binding upon the company.

There being no other question in the case requiring discussion, the judgment must be affirmed, with costs. All concur.⁴

II. Classes of Agents and Their Powers ⁵

WESTERN HOME INS. CO. v. HOGUE.

(Supreme Court of Kansas, 1889. 41 Kan. 524, 21 Pac. 641.)

Commissioners' decision.

This action was brought by S. R. Hogue against the Western Home Insurance Company to recover on a policy of fire insurance. There was a judgment for the plaintiff, and defendant brings error.

⁴ See, also, *Hicks v. British America Assur. Co.*, 13 App. Div. 444, 43 N. Y. Supp. 623 (1897).

⁵ For discussion of principles, see Vance on Insurance, §§ 109, 110. See, also, Cooley, *Briefs on the Law of Insurance*, vol. 1, p. 345 et seq.

The findings of fact show: That upon the 3d day of August, 1885, the defendant, by its policy of insurance, duly signed by the president and secretary of the defendant, and countersigned by the duly-authorized agent at Spring Hill, Kan., did insure the plaintiff against loss or damage by fire to an amount not to exceed \$500, on his general stock of hardware, etc. That upon the 3d day of August, 1886, the plaintiff paid to G. C. Hunter, then the duly-authorized agent of the defendant at Spring Hill, Kan., the sum of \$20 as a consideration for the renewal of said policy for one year, from the 3d day of August, 1886, at noon, to the 3d day of August, 1887, at noon, and Hunter issued to the plaintiff a renewal receipt. Hunter appropriated the said \$20 to his own use, and never reported any renewal of said policy to the defendant, and the officers of the defendant never knew of any renewal or attempted renewal of said policy, until after the fire. Hunter was duly authorized by said defendant insurance company to issue policies of insurance sent to him in blank by the company; to receive the premium therefor, and renew outstanding and expiring policies, by issuance of a new policy, but not by renewal receipt. Plaintiff, at the time he paid said \$20 and received said renewal receipt therefor, believed, and had reason to believe, that said Hunter had authority to issue said renewal receipt, and had no notice to the contrary; defendant having held out said Hunter as its general agent at Spring Hill, Kan.

CLOGSTON, C.* * * The court found that the agent who made this renewal certificate had authority to renew policies, though not in the manner of renewal certificates, but by issuing new policies. Now, it is contended by the plaintiff that the agent, not being authorized to issue renewal certificates, and the fact that the company did not so renew its policies, the acts of this agent would not bind the company. Where it is shown, as in this case, that the agent is a general agent, and is so held out to the community in which he does business, and third parties transact business with him as such agent, in good faith, without knowledge of his limited authority, the acts of such an agent must bind the principal; and where the agent is shown to have authority to renew a policy in any manner, and he does renew a policy in a manner not authorized by his company, but that fact is not known to the insured, the agent's renewal must bind the company. See *Insurance Co. v. McLanathan*, 11 Kan. 533; *Insurance Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617. In *Baubie v. Insurance Co.*, 2 Dill. 156, Fed. Cas. No. 1,111, it was said: "A local agent of a foreign insurance company, empowered to solicit insurance, receive premiums, and to issue and deliver policies, has, in favor of third persons dealing with him in good faith, and without notice of any restriction on his authority, power to bind the company by * * * a parol contract to renew the policy from time to time dur-

* Part of the opinion is omitted and the statement of facts is rewritten.

ing plaintiff's ownership of the property." It is therefore recommended that the judgment of the court below be affirmed.

PER CURIAM. It is so ordered; all the Justices concurring.

AMERICAN EMPLOYERS' LIABILITY INS. CO. v. BARR.

(Circuit Court of Appeals of United States, Eighth Circuit, 1895. 68 Fed. 873, 16 C. C. A. 51.)

In Error to the Circuit Court of the United States for the District of Colorado.

Before CALDWELL, SANBORN, and THAYER, Circuit Judges.

THAYER, Circuit Judge.¹ This writ of error was sued out by the American Employers' Liability Insurance Company, the plaintiff in error, to reverse a judgment which was recovered against it in the circuit court of the United States for the district of Colorado on an accident policy of insurance. * * *

The insured sustained certain injuries on May 20, 1892, by falling from a platform in a building which was in process of construction in the city of Denver, and died four days thereafter, as it is claimed, from injuries resulting from such fall. A suit was brought on the policy by William P. Barr, the defendant in error, to whom, under the aforesaid provisions of the policy, the same was made payable in the event of the death of the assured, and a judgment was recovered against the defendant company for the sum of \$5,626.58.

One of the principal errors assigned is the action of the trial court in sustaining a demurrer to the second defense which was pleaded by the defendant company. That defense was, in substance, as follows: The defendant averred that it held itself out as insuring preferred or selected risks in professional and mercantile classes, and that it did not hold itself out as insuring persons while actually engaged in extrahazardous employments, such as "supervising contractor," in which employment Cousley, appears to have been engaged when he was injured; that at the time the policy in suit was issued one Francis A. Chapman was its duly-authorized agent to solicit insurance in its behalf in the state of Colorado, "subject to and in accordance with the instructions, terms, and conditions contained in applications for insurance, prospectuses, and insurance policies, and business forms, and regulations adopted and prescribed by the board of directors and the president, secretary and general manager, * * * and that said Chapman was not authorized to waive, change, or modify any of said terms or conditions; * * * that the defendant company, for the purpose of carrying on its business in the state of Colorado, within the limitations aforesaid, "furnished its said agent, Francis A. Chapman, with printed blanks and other stationery

¹ Part of the opinion is omitted.

reasonably proper and necessary to carry on and conduct said business"; that on May 6, 1892, William P. Cousley made a certain written application to its said agent, Chapman, for an accident policy of insurance, which application was set out in full in the answer: that, according to the established mode of doing business, it was the duty of said Chapman, on receipt of said application, to transmit the same to its branch office in the city of Chicago, and thence to its general office in the city of New York; that said application was so transmitted, but that it failed to reach New York until after the assured had sustained the injuries on account of which he ultimately died. * * *

It is somewhat difficult to comprehend the precise nature of the defense intended to be stated in the foregoing paragraph of the answer. We shall assume, however, that the defendant company intended to make two defenses: First, that the contract was not fully consummated in the lifetime of the assured; and, second, that, if fully consummated, the assured was guilty of such a concealment of material facts, or made such false representations, as rendered the contract voidable at the election of the company.

Conceding, for the purposes of this decision, that it was proper to plead both of the aforesaid defenses in a single paragraph of the answer, and that it was not necessary to state the defenses separately, still we think that neither of them was well pleaded. It is clearly shown by the plea aforesaid, and by other portions of the answer as well, that Chapman was the duly-authorized agent of the defendant company to solicit insurance in its behalf in the state of Colorado: that he was provided with such policies, applications, and other printed blanks as were necessary to conduct an insurance business; that he accepted Cousley's application for insurance, executed and delivered the policy, and received the premium thereon for one year's insurance. This made the negotiation complete. If Chapman disobeyed secret instructions which he had received from the company, or if he departed from the usual and ordinary course of business, in delivering the policy and in collecting the premium before Cousley's application had been received and had been approved by the home office in the city of New York, the assured cannot be prejudiced by such misconduct on the part of the company's agent.

It has been decided, time and again, that when an insurance company appoints an agent to solicit risks, and provides him with printed forms of its policies, duly signed and sealed by the proper officers of the company, it will be bound by a policy which the agent sees fit to countersign and deliver, unless the assured has notice, when the policy is delivered, that the agent is exceeding his powers or is violating his instructions. Authority to solicit risks for and in behalf of a company, coupled with possession of its printed forms of applications, and policies duly signed and sealed, vests the agent thus equipped with an apparent authority to make a binding contract of insurance

without any further approval of the risk by the company. *Insurance Co. v. Wilkinson*, 13 Wall. 222, 234, 235, 20 L. Ed. 617; *Insurance Co. v. Snowden*, 7 C. C. A. 264, 12 U. S. App. 704, 58 Fed. 342; *Insurance Co. v. Robison*, 7 C. C. A. 444, 19 U. S. App. 266, 58 Fed. 723, 22 L. R. A. 325, and cases there cited.

In the present case there was no averment in the answer that Cousley had notice that his policy would not take effect until his application was approved by the home office, nor was there any averment that he was acquainted with a mode of doing business on the part of the defendant company which necessitated an approval of the application by the home office before the contract became complete. He had a right to presume that the contract took effect when the policy was delivered to him and the premium was paid, and that Chapman was authorized to accept the risk and execute the contract.

The second defense above mentioned, which is suggested by the answer, is equally without merit. * * * Affirmed.

O'BRIEN v. NEW ZEALAND INS. CO.

(Supreme Court of California, 1895. 108 Cal. 227, 41 Pac. 298.)

Action by Thomas H. O'Brien against the New Zealand Insurance Company. Judgment for plaintiff. Defendant appeals.

GAROUTTE, J. This is an action upon a contract of fire insurance, and defendant is appellant, as is usual in that class of cases. One Peters was defendant's local agent in the town of Reedly, Fresno county, and under his commission as agent he had no authority to enter into a contract of insurance. But he was appointed subagent "to receive proposals for insurance, and fix rates of premium, and to receive money for policies and certificates of insurance."

Upon July 2, 1892, plaintiff, O'Brien, made a written application to Peters, upon one of defendant's blanks, for insurance upon his saloon, building and fixtures. This application, accompanied by a letter from Peters, was deposited in the postoffice July 5th, addressed to defendant at San Francisco. The letter referred to the inclosed application, with the suggestion that the company should place the insurance, if it was deemed advisable. The plaintiff's building was occupied as a liquor saloon, and defendant did not take insurance upon saloons, and the agent, Peters, knew this fact. When the application was made, the agent informed plaintiff that he was insured from that time. Upon July 4th, which was between the time of the making of the application and the time when the application was mailed to defendant, the property was destroyed by fire. It thus appears that the building was destroyed, not only before the application for insurance was passed upon by the defendant, but before the application was ever heard of by the company.

As suggested, the agent, Peters, had no authority to enter into a contract of insurance with plaintiff. His powers did not go to that extent. Under a commission of authority in all material respects similar to the authority possessed by Peters, it was held in *Stewart v. Insurance Co.*, 102 Cal. 218, 36 Pac. 410, that the agent had no actual authority to enter into a contract of insurance. In that case it was an application for the renewal of a policy, and the court said: "The proposal of plaintiff made to such agent for a renewal of said policy was, until communicated to and accepted by defendant, nothing more than a mere offer upon the part of plaintiff to renew such policy." That there was no actual contract of insurance in this case, as far as defendant is concerned, is apparent at a glance, for the contract could only be made with the defendant, and the defendant knew nothing of it. The defendant had the right to reject the application when presented, and until it was presented and granted no contract was possible. If there was a contract of insurance in force from July 2d until the application reached the defendant, then it was equally in force after that time and during the entire period covered by the policy; but such a construction would deprive the defendant of the right to reject unsatisfactory applications, and place the power of contracting in the hands of agents like Peters, a result diametrically opposed to its purposes and practices.

Peters was not only lacking in actual authority to enter into a contract of insurance with plaintiff, but the evidence fails to show any ostensible authority in him. Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess. Civ. Code, § 2317. Certainly in this case the company did not intentionally cause plaintiff to believe that Peters had authority to make a contract of insurance, and there is not a word in the evidence to indicate a want of ordinary care upon defendant's part, which caused or allowed plaintiff to believe that Peters was clothed with any such authority. It would seem to follow inevitably that, this agent having neither actual nor ostensible authority to make a contract of insurance, plaintiff must fail of recovery.

The agent, Peters, told plaintiff that he had no power to write policies, and that the application would have to be forwarded to defendant at San Francisco. This statement would indicate that Peters did not attempt to enter into a contract of insurance with plaintiff, and that plaintiff probably so understood it. If this were all the evidence, there could hardly be a question about it, but it appears that Peters, at the time of the application, told plaintiff that his insurance would begin at that time. While this statement may have resulted in misleading plaintiff, it could have no possible binding effect upon the company defendant. At best, it was but the agent's conclusion as to the legal effect of the transaction, and any loss suffered by plaintiff by reason of this mistake of the agent is a matter to be settled between

them. A reasonable view of the meaning of the agent's language would seem to be that the policy would take effect as of the date of the application, if the application were accepted, for, until action upon it by the company, it was impossible to say whether or not it ever would take effect.

It is attempted to bring this case within the principle declared in *Harron v. Insurance Co.*, 88 Cal. 16, 25 Pac. 982, but the facts do not justify it. Borchers, the special agent of the company, was not authorized to enter into contracts of insurance. He had no more authority in this regard than the subagent, Peters, and, not having power to enter into contracts himself, he necessarily had no authority to delegate such a power to Peters. His appearance upon the scene, pending the negotiations for this insurance, fails to strengthen the plaintiff's case. Looking at the case from all sides, we think it would be a manifest injustice to require defendant to pay the loss suffered by plaintiff. This company did not insure saloon buildings, and the application would most probably have been rejected, as far as defendant was concerned, upon presentation.

We conclude the defendant assumed no risk, and is liable for no loss. For the foregoing reasons the judgment and order are reversed, and the cause remanded.

III. Limitations upon the Powers of Agents⁸

1. IMPROPER LIMITATIONS IN GENERAL

LAMBERTON v. CONNECTICUT FIRE INS. CO.

(Supreme Court of Minnesota, 1888. 39 Minn. 129, 39 N. W. 76, 1 L. R. A. 222.)

DICKINSON, J.⁹ The plaintiff recovered a verdict in this action upon a contract of fire insurance. This is an appeal from an order refusing a new trial. The construction and effect of the following provisions of the policy are to be considered: "If the premises hereby insured are or shall hereafter become vacated or unoccupied, and so remain for more than ten days, * * * without notice to the company in each case, and consent indorsed hereon, * * * this policy shall be void. * * * And it is further expressly covenanted by the parties hereto that no officer, agent, or representative of this

⁸ For discussion of principles, see Vance on Insurance, §§ 114-117. See, also, Cooley, Briefs on the Law of Insurance, vol. 3, pp. 2580-2592, 2607, et seq.

⁹ Part of the opinion is omitted.

company shall be held to have waived any of the terms and conditions of this policy, unless such waiver shall be indorsed hereon in writing." Some months prior to the destruction of the premises by fire they became, and thereafter remained, vacant; the assured in the mean time endeavoring to secure a suitable tenant. The local agent of the defendant at Winona, where the property was situated, who had issued this policy, knew that the house was vacant during all of this time, and in negotiations with the assured upon this subject he treated the policy as still continuing in force; so that, if the defendant was bound by his acts in this particular, it would be estopped to claim that its liability had terminated. He did not, however, notify the company of the fact, nor was there any written consent that the policy should remain in force.

The question is thus presented whether the conduct of the agent affected and bound the company. The position taken on the part of the company is that the power of the agent to bind the principal in this particular was, by the clause found at the close of the foregoing extract from the policy, so restricted that he could only do this by a written consent indorsed on the policy; and that, the assured being thus advised of the restrictions upon the power of the agent, the action of the latter was ineffectual to bind the company.

It is an important consideration that this policy does not impose any restriction upon the power of any particular agent, or class of agents; nor does it limit the power of some agents by conferring authority exclusively upon others; nor does it prescribe the manner in which alone a particular agent or class of agents shall exercise their authority. We do not, therefore, express any opinion concerning the effect of such stipulations. The restriction here is so broad that it applies alike to every "officer, agent, or representative of this company;" and, as a corporation can only act through such agencies, the substance of the provision under consideration is that the company shall not be held to have waived any of the terms or conditions of the policy, unless its waiver be expressed by a written indorsement on the policy. That is to say, in other words, that one of the parties to a written contract, which is not required by law to be in writing, cannot subsequent to the making of the contract, waive, by parol agreement, provisions which had been incorporated in the contract for his benefit. A contracting party cannot so tie his own hands, so restrict his own legal capacity for future action, that he has not the power, even with the assent of the other party, to bind or obligate himself by his further action or agreement contrary to the terms of the written contract. *Insurance Co. v. Earle*, 33 Mich. 143. This is self-evident.

The clause of this policy relied upon, as expressly restricting the power of the agent whose conduct is here in question, is of that character. If it is effectual at all, as a limitation of the power of

future action, it limits the power of every agent, officer, and representative of the company, and hence, practically, that of the corporation. It is no more applicable to this particular agent than to all of those to whom the conduct of the affairs of the corporation is committed. In that board scope, and as applicable to all the representatives of the corporation, it cannot be enforced so as to render inoperative such subsequent action or agreement of corporate agents as would, if it were not for this clause in the contract, be deemed the effectual action or agreement of the corporation. A more restricted application of this clause, making it to refer to this particular agent, or to any particular class of agents or officers, cannot be made; nor can the clause in the former part of the above extract from the policy, as to the effect of vacancy "without notice to the company and consent indorsed hereon," be construed as a limitation upon the power of any particular agent or class of agents. If it applies to any agent or officer, it does to all; and if such a stipulation is not effectual to limit the legal capacity of the corporation as to its future action, it does not limit its capacity to act by its agents. The company, then, was legally capable, acting through its proper agents, of waiving its right to treat the policy as of no further binding force by reason of the vacancy; and it could also waive compliance with that part of the same provision which related to the consent being indorsed on the policy.

Confessedly, the agent whose conduct is in question, had authority to give such consent by indorsing the same upon the policy. When, in negotiating upon this subject with the assured, he did consent, as is established by the verdict of the jury, he was acting as the agent of the company. His action was the action of the company; and the insured having been led to understand, as the agent seems to have done, that the contract should remain in force until further action should be taken, the company is now estopped, as by its own conduct, to claim the contrary.

This conclusion finds sufficient support in the following decisions, and in others, although we are aware that there are decisions to the contrary. *Insurance Co. v. Earle*, 33 Mich. 143; *Viele v. Insurance Co.*, 26 Iowa, 9, 96 Am. Dec. 83; *Young v. Insurance Co.*, 45 Iowa, 377, 24 Am. Rep. 784; *Insurance Co. v. McCrea*, 8 Lea (Tenn.) 513, 41 Am. Rep. 647; *Von Bories v. Insurance Co.*, 8 Bush (Ky.) 133; *Insurance Co. v. Gusdorf*, 43 Md. 506; *Insurance Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689; *Stolle v. Insurance Co.*, 10 W. Va. 546, 27 Am. Rep. 593; *Carrugi v. Insurance Co.*, 40 Ga. 135, 2 Am. Rep. 567; *Wakefield v. Insurance Co.*, 50 Wis. 532, 7 N. W. 647; *Whited v. Insurance Co.*, 76 N. Y. 415, 32 Am. Rep. 330; *Morrison v. Insurance Co.*, 69 Tex. 353, 6 S. W. 605, 5 Am. St. Rep. 63. The order refusing a new trial is affirmed.

2. STIPULATION THAT AGENT TAKING APPLICATION IS AGENT OF INSURED

KANSEL v. MINNESOTA FARMERS' MUT. FIRE INS. ASS'N.

(Supreme Court of Minnesota, 1883. 31 Minn. 17, 16 N. W. 430, 47 Am. Rep. 776.)

MITCHELL, J.¹⁰ 1. On principle, as well as from considerations of public policy, agents of insurance companies authorized to procure applications for insurance, and to forward them to the companies for acceptance, must be deemed the agents of the insurers and not of the insured in all that they do in preparing the applications, or in any representations they may make to the insured as to the character or effect of the statements therein contained. This rule is rendered necessary by the manner in which business is now usually done by the insurers. They supply these agents with printed blanks, stimulate them by the promise of liberal commissions, and then send them abroad in the community to solicit insurance. The companies employ them for that purpose, and the public regard them as the agents of the companies in the matter of preparing and filling up these applications—a fact which the companies perfectly understand. The parties who are induced by these agents to make applications for insurance rarely know anything about the general officers of the company, or its constitution and by-laws, but look to the agent as its full and complete representative in all that is said or done in regard to the application. And in view of the apparent authority with which the companies clothe these solicitors, they have a perfect right to consider them such. Hence, where an agent to procure and forward applications for insurance, either by his direction or direct act, makes out an application incorrectly, notwithstanding all the facts are correctly stated to him by the applicant, the error is chargeable to the insurer and not to the insured. *Ins. Co. v. Mahone*, 21 Wall. 152, 22 L. Ed. 593; *Ins. Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617; *Malleable Iron Works v. Ins. Co.*, 25 Conn. 465; *Hough v. Ins. Co.*, 29 Conn. 10, 76 Am. Dec. 581; *Woodbury Savings Bank, etc., Ass'n v. Ins. Co.*, 31 Conn. 517; *Miner v. Ins. Co.*, 27 Wis. 693, 9 Am. Rep. 479; *Winans v. Ins. Co.*, 38 Wis. 342; *Rowley v. Ins. Co.*, 36 N. Y. 550; *Brandup v. Ins. Co.*, 27 Minn. 393, 7 N. W. 735; 2 Am. Lead. Cas. (5th Ed.) 917 et seq.; Wood, *Ins. c. 12*; May, *Ins. § 120*.

2. After the courts had generally established this doctrine, many of the insurance companies, in order to obviate it, adopted the in-

¹⁰ Part of the opinion is omitted.

genious device of inserting a provision in the policy that the application, by whomsoever made, whether by the agent of the company or any other person, shall be deemed the act of the insured and not of the insurer. But, as has been well remarked by another court, "there is no magic in mere words to change the real into the unreal. A device of words cannot be imposed upon a court in place of an actuality of fact." If corporations are astute in contriving such provisions, courts will take care that they shall not be used as instruments of fraud or injustice. It would be a stretch of legal principles to hold that a person dealing with an agent, apparently clothed with authority to act for his principal in the matter in hand, could be affected by notice, given after the negotiations were completed, that the party with whom he had dealt should be deemed transformed from the agent of one party into the agent of the other. To be efficacious, such notice should be given before the negotiations are completed. The application precedes the policy, and the insured cannot be presumed to know that any such provision will be inserted in the latter. To hold that by a stipulation, unknown to the insured at the time he made the application, and when he relied upon the fact that the agent was acting for the company, he could be held responsible for the mistakes of such agent, would be to impose burdens upon the insured which he never anticipated. Hence we think that if the agent was the agent of the company in the matter of making out and receiving the application, he cannot be converted into the agent of the insured by merely calling him such in the policy subsequently issued. Neither can any mere form of words wipe out the fact that the insured truthfully informed the insurer, through its agent, of all matters pertaining to the application at the time it was made. We are aware that in so holding we are placing ourselves in conflict with the views of some eminent courts. But the conclusion we have reached is not without authority to sustain it, and is, as we believe, sound in principle, and in accordance with public policy. *Wood, Ins. § 139; May, Ins. § 140; Com. Ins. Co. v. Ives, 56 Ill. 402; Gans v. St. Paul F. & M. Ins. Co., 43 Wis. 108, 28 Am. Rep. 535; Columbia Ins. Co. v. Cooper, 50 Pa. 331.*

3. It is contended by respondent that there is a distinction in this regard between "stock" and "mutual" insurance companies; that the difference in the character of the companies makes a difference in the relative duties of the applicant and the company, and the authority of the agents employed; that in the case of a mutual company the application is in effect not merely for insurance, but for admission to membership,—the applicant himself becoming a member of the company upon the issue of the policy. By some courts a distinction in this respect is made between the two classes of companies. This distinction is usually based upon the ground that the stipulations held binding upon the insured are contained in the charter or by-laws of the company, and that a person applying for membership is

conclusively bound by the terms of such charter and by-laws. Such is not this case, for the stipulations claimed to bind the insured are only in the policy. But, so far as concerns the questions now under consideration, we fail to see any distinction between the two kinds of companies, and we feel confident that the average applicant for insurance is rarely aware of any. It is true that in the case of a mutual company the insured becomes in theory a member of the company upon the issue of the policy. But in applying and contracting for insurance the applicant and the company are as much two distinct persons as in the case of a stock company, and we see no reason for holding the agent who takes the application any less the agent of the insurer in the one case than in the other. The membership does not begin until the policy is issued. As to all previous negotiations the agent acts only for the company. *Columbia Ins. Co. v. Cooper*, *supra*; *May, Ins. §§ 139 et seq.* * * * *Reversed.*¹¹

3. STIPULATION THAT INSURER SHALL NOT BE CHARGED WITH KNOWLEDGE OF AGENT

STERNAMAN v. METROPOLITAN LIFE INS. CO.

(Court of Appeals of New York, 1902. 170 N. Y. 13, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625.)

Action by Olive A. Sternaman against the Metropolitan Life Insurance Company. From a judgment of the appellate division (49 App. Div. 473, 63 N. Y. Supp. 674) affirming a judgment in favor of defendant entered on a verdict directed by the court, plaintiff appeals.

This action was brought to recover the sum of \$1,000, alleged to be due on a policy of insurance issued by the defendant to the plaintiff, as beneficiary, upon the life of her husband, George H. Sternaman. The policy recites that the promise to insure was made in consideration of the statements contained in the application, all of which are referred to as warranties, and made a part of the contract. The application consists of two parts, A and B. Part A, entitled, "Application to the Metropolitan Life Insurance Company," consists of questions relating to the age, occupation, family history, etc., of Mr. Sternaman, all of which were truthfully answered. At the close of these questions and answers there appeared the following: "It is hereby declared, agreed, and warranted by the undersigned that the answers and statements contained in the foregoing application, and

¹¹ See, also, the following case, *Sternaman v. Metropolitan Life Ins. Co.*

those made to the medical examiner, as recorded in parts A and B of this sheet, together with this declaration, shall be the basis and become part of the contract of insurance with the Metropolitan Life Insurance Company; that they are full and true and are correctly recorded, and that no information or statement not contained in this application and in the statements made to the medical examiner, received or acquired at any time by any person, shall be binding upon the company, or shall modify or alter the declaration and warranties made therein; that the persons who wrote in the answers and statements were and are our agents for the purpose, and not the agents of the company, and that the company is not to be taken to be responsible for its preparation, or for anything contained therein or omitted therefrom; that any false, incorrect, or untrue answer, any suppression or concealment of facts in any of the answers, any violation of the covenants, conditions, or restrictions of the policy, any neglect to pay the premium on or before the date it becomes due, shall render the policy null and void, and forfeit all payments made thereon." * * *

VANN, J.¹² The decision of this appeal turns substantially upon the following question: When an applicant for life insurance makes truthful answers to all questions asked by the medical examiner, who fails to record them as given, and omits an important part, stating that it is unimportant, can the beneficiary show the answers actually given, in order to defeat a forfeiture claimed by the insurer on account of the falsity of the answers as recorded, even if it was agreed in the application that the medical examiner, employed and paid by the insurer only, should not be its agent, but solely the agent of the insured?

The power to contract is not unlimited. While, as a general rule, there is the utmost freedom of action in this regard, some restrictions are placed upon the right by legislation, by public policy, and by the nature of things. Parties cannot make a binding contract in violation of law or of public policy. They cannot in the same instrument agree that a thing exists, and that it does not exist, or provide that one is the agent of the other, and at the same time, and with reference to the same subject, that there is no relation of agency between them. They cannot bind themselves by agreeing that a loan in fact void for usury is not usurious, or that a copartnership which actually exists between them does not exist. They cannot by agreement change the laws of nature or of logic, or create relations, physical, legal, or moral, which cannot be created. In other words, they cannot accomplish the impossible by contract.

The parties to the policy in question could agree that the person who filled out part A of the application was the agent of the in-

¹² Part of the opinion is omitted and the statement of facts is abridged from that in the official report.

sured and not of the company. There is a difference in the nature of the work of filling out the blank to be signed by the insured, and that of filling out the blank furnished for the use of the medical examiner. The former is the work of the insured, and may be done as well by one person as by another. He may do it himself, or appoint an agent to do it for him. It is quite different, however, with the work of the medical examiner, because that requires professional skill and experience and the insurer permits it to be done only by its own appointee. The insured can neither do that work himself, nor appoint a physician to do it, because the insurer very properly insists upon making the selection itself. The medical examiner was selected, employed, and paid by the company. The insured had nothing to do with him, except to submit to an examination by him, as the expert of the company, and to answer the questions asked by him in behalf of the company. This he was forced to do in order to procure insurance; for the company required him to undergo a medical examination by an examiner selected and instructed by itself, before it would act upon his application for a policy. He could neither refuse to be examined, nor select the examiner, and he was not responsible if the latter was negligent or unfit for the duty assigned to him. He could not direct or control him, but the company could and did; for it required him to make the examination, fill out part B of the application blank, and report the facts with his opinion. The insured made no contract with the examiner, and was under no obligation to pay him for his services. The company, however, made a contract with him to do certain work for it, and agreed to pay him for the work when done.

As between the examiner and the insured, the relation of principal and agent did not exist, while, as between the examiner and the company, that relation did exist by operation of law; yet it is claimed that, as between the insured and the company, the examiner was the agent of the former only, because he had so agreed, not with the examiner, but with the company itself. Under the circumstances, an agreement that the physician was the agent of the insured was like an agreement that the company or its president was his agent. It was in contradiction of every act of the parties and of every fact known to either. The law, when applied to the facts, made the physician the agent of the company, and not of the insured.

* * *

An agency is created by contract, express or implied. It "is a legal relation by virtue of which one party (the agent) is employed and authorized to represent and act for the other (the principal) in business dealings with third persons. The distinguishing features of the agent are his representative character and his derivative authority." Mechem, Ag. § 1; Story, Ag. § 3. "To constitute agency there must be consent both of principal and of agent." Whart. Ag. § 1. What was the contract between the company and the examiner?

The defendant, being a corporation, could act only through agents. Having some work to do in the form of a medical examination, it requested Dr. Langley to do it. It created the relation of agency between him and itself by employing him, paying him, etc. It alone could discharge him, and to it alone was he responsible for disobedience or negligence. It could control his conduct by any reasonable instructions, and hold him liable if he violated them. It prescribed certain questions that he should ask, and required him to take down the answers in a blank prepared by itself. It could sue him if he did not do it properly, and he could sue the company if it did not pay him for doing it. Thus we have an agency between the company and the examiner established by mutual agreement, with the right on the one hand to instruct, to discharge, and to hold liable for default, and on the other to compel payment for services rendered. Hence what the examiner did in the course of his employment the company did, and what he knew from discovery while acting for it the company knew.

What was the contract between the insured and the examiner? None whatever. The insured did not employ the examiner, and the examiner did not agree to work for him. Neither was under any legal obligation or liability to the other. The insured could not instruct the doctor, nor discharge him, nor sue him for negligence, and the doctor could not sue the insured for compensation. The relation of principal and agent did not exist between them, either by virtue of any contract or by operation of law.

What was the contract between the insured and the insurer? With the relations above described as existing between the insurer and the examiner in full force, and in the absence of any legal relation between the examiner and the insured, an attempt was made by the insurer, by an agreement imposed upon the insured, to subvert the relation of its own examiner to itself, and establish a relation between him and the insured, without the consent of either given to the other. There was no tripartite contract. While the contract between the doctor and the company was still in existence, the latter agreed with a third party only that that contract did not in fact exist between the two parties who made it, but did exist between two parties who did not make it. This was not possible by any form of words, any more than to make black white, or truth falsehood. We think that the medical examiner was the agent of the defendant in making the examination of the insured, recording his answers, and reporting them to the company.

Sound public policy prohibits the company from stipulating for immunity from the consequences of its own negligence, or, what is the same thing, the negligence of its agent. *Rathbone v. Railroad Co.*, 140 N. Y. 48, 35 N. E. 418. The manner of conducting the examination was, of necessity, intrusted to the judgment of the medical examiner to a great extent. His judgment might influence him

to take down the answers in a general or in a particular way. In exercising his judgment he determined that certain answers were too trivial to be recorded. In making that determination he was not acting for the insured, but for the company; for it had furnished him with a blank, and had invested him with power to take down the answers, and hence with power to decide how they should be taken down. If he was negligent or failed to do his duty in this regard, the company could not, by an agreement made in advance, cast the burden upon the insured, who did not select or employ him. His negligence was its own negligence, and it could not by contract make it the negligence of the insured, or relieve itself from the legal consequences thereof. * * *

The insured also agreed that "no information or statement not contained in this application, and in the statements made to the medical examiner, received or acquired at any time by any person, shall be binding upon the company, or shall modify or alter the declarations and warranties made therein." The facts sought to be proved were contained in the oral statements made to the medical examiner, but, assuming that recorded statements only were meant, the result would be an agreement that the company might perpetrate a fraud upon the insured, by issuing a policy and accepting premiums thereon, knowing all the time that the contract was void, or voidable at its election. The law does not permit this; for it declares that the company is estopped from taking advantage of such a contract, because it would be against equity and opposed to public policy.

We adopt, as expressing our own views upon the subject, the following language used by the supreme court of the United States, in a case somewhat analogous: "If, however, we suppose the party making the insurance to have been an individual, and to have been present when the application was signed, and soliciting the assured to make the contract of insurance, and that the insurer himself wrote out all these representations, and was told by the plaintiff and his wife that they knew nothing at all of this particular subject of inquiry, and that they refused to make any statement about it, and yet, knowing all this, wrote the representation to suit himself, it is equally clear that for the insurer to insist that the policy is void because it contains this statement would be an act of bad faith and of the grossest injustice and dishonesty. And the reason for this is that the representation was not the statement of the plaintiff, and that the defendant knew it was not when he made the contract, and that it was made by the defendant, who procured the plaintiff's signature thereto. It is precisely in such cases as this that courts of law in modern times have introduced the doctrine of equitable estoppel, or, as it is sometimes called, 'estoppel in pais.' * * * Indeed, the doctrine is so well understood and so often enforced that if, in the transaction we are now considering, Ball, the insurance agent who made out the application, had been in fact the underwriter of the

policy, no one would doubt its applicability to the present case. Yet the proposition admits of as little doubt that if Ball was the agent of the insurance company, and not of the plaintiff, in what he did in filling up the application, the company must be held to stand just as he would if he were the principal. * * * This principle does not admit oral testimony to vary or contradict that which is in writing, but it goes upon the idea that the writing offered in evidence was not the instrument of the party whose name is signed to it; that it was procured under such circumstances by the other side as estops that side from using it or relying on its contents; not that it may be contradicted by oral testimony, but that it may be shown by such testimony that it cannot be lawfully used against the party whose name is signed to it." *Insurance Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617.

We think it is established by the weight of authority in this state that the medical examiner is the agent of the insurer in making the examination, taking down the answers, and reporting them to the company; that his knowledge thus acquired, his interpretation of the answers given, and his errors in recording them, are the knowledge, interpretation, and errors of the company itself, which is estopped from taking advantage of what it thus knew and what it had thus done when it issued the policy and accepted the premiums. *O'Farrell v. Insurance Co.*, 22 App. Div. 495, 48 N. Y. Supp. 199; *Id.*, 44 App. Div. 554, 60 N. Y. Supp. 945; *Id.*, 168 N. Y. 592, 60 N. E. 1117; *O'Brien v. Society*, 117 N. Y. 310, 318, 22 N. E. 954; *Grattan v. Insurance Co.*, 92 N. Y. 274, 44 Am. Rep. 372; *Grattan v. Insurance Co.*, 80 N. Y. 281, 36 Am. Rep. 617; *Flynn v. Insurance Co.*, 78 N. Y. 568, 34 Am. Rep. 561; *Whited v. Insurance Co.*, 76 N. Y. 415, 32 Am. Rep. 330; *Sprague v. Insurance Co.*, 69 N. Y. 128. * * * Reversed.

WAIVER AND ESTOPPEL

I. General Principles ¹

METCALF v. PHENIX INS. CO.

(Supreme Court of Rhode Island, 1899. 21 R. I. 307, 43 Atl. 541.)

Action by Mary L. Metcalf against the Phenix Insurance Company. On demurrer.

MATTESON, C. J. This is assumpsit on a policy of insurance against loss by fire. The defendant pleads that suit was not begun within 12 months next after the fire, as required by limitation in the policy. The plaintiff replies that the defendant, by its duly-authorized agents and servants, entered into negotiations with her for the purpose of adjusting the loss without litigation, and repeatedly promised her that the loss should be adjusted without suit, and requested her not to bring suit; that, relying on these representations, requests, and promises, she was induced to delay, and did delay, bringing suit, until the 12 months had expired, and that, by reason of such representations, requests, and promises, the defendant is estopped to plead the limitation in the policy. By way of rejoinders, the defendant sets up, in answer to the replications, the final clause of the policy, to the effect that no officer, agent, or other representative of the company shall have power to waive any provision or condition of the policy except such as, by the terms of the policy, may be the subject of agreement indorsed thereon or added thereto, and avers that the limitation in the policy is not a provision which, by the terms of the policy, may be the subject of agreement to be indorsed on or added to it. The plaintiff demurs to the rejoinders upon the ground that the facts alleged in the replications to avoid the limitation of the policy are pleaded as an estoppel, and not as a waiver.

The question thus presented is whether the clause in the policy set up in the rejoinders relating to waiver constitutes an answer to the facts pleaded in the replications, and which, if proved, would create an estoppel in pais against the defendant, and preclude it from availing itself of the limitation respecting the bringing of suits. *Oakman v. Insurance Co.*, 9 R. I. 357. As stated in this case, strictly speaking, the defendant could not waive its right to insist on the limitation until the time came for it to so insist, i. e. until it had been sued. The clause in question is to receive a strict construction against the

¹ For discussion of principles, see Vance on Insurance, §§ 118-120. See, also, Cooley, Briefs on the Law of Insurance, vol. 3, p. 2455 et seq.

defendant, in whose favor it was designed to operate, and is to be construed, if possible, so as to prevent a forfeiture. 11 Am. & Eng. Enc. Law, 286, and cases cited. Giving to the clause this strict construction, it is clear that it can have no application to the limitation against the bringing of suits until the suit has been begun, and therefore cannot be applied to matters which occurred previously to the suit. And, since it in terms applies only to matters constituting a waiver, it is clear that it can have no application to facts creating an estoppel; for, though the terms "estoppel" and "waiver" may sometimes loosely be used interchangeably, there is a clear distinction between them.

A waiver arises by the intentional relinquishment of a right by a person or party, or by his neglect to insist upon his right at the proper time, and does not imply any conduct or dealing with another by which that other is induced to act or forbear to act to his disadvantage, while an estoppel necessarily presupposes some such conduct or dealing with another. The matters set up in the replications are matters operating by way of estoppel, and not as a waiver, and our opinion is therefore that the rejoinders are not a sufficient answer to them. Demurrers to the first rejoinder to the replication to the second plea, and the first rejoinder to the replication to the third plea, sustained, and said rejoinders overruled. Case remitted to the common-pleas division for further proceedings.²

ALABAMA STATE MUT. ASSUR. CO. v. LONG CLOTHING & SHOE CO.

(Supreme Court of Alabama, 1899. 123 Ala. 667, 26 South. 655.)

Action by the Long Clothing & Shoe Company against the Alabama State Mutual Assurance Company on an insurance policy. From a judgment in favor of plaintiff, defendant appeals.

SHARPE, J.³ The action is in the Code form, upon a policy of fire insurance. The errors assigned relate only to the action of the court in overruling demurrers to replications. * * * The second plea averred, in substance, that the plaintiff violated the contract of insurance by obtaining, contrary to its stipulations, additional insurance upon the goods alleged to have been damaged, without giving notice to, and obtaining the written consent of, the defendant. The replications in question each set up in avoidance of the plea facts depended upon as constituting a waiver on the part of the defendant of the stipulation respecting additional insurance.

² Distinction between waiver and estoppel, see, also, *Germania Ins. Co. v. Bromwell*, post, p. 258.

³ Statement of facts and part of the opinion are omitted.

Provisions like the one set out in the second plea are inserted for the benefit of the insurer, and can therefore be waived by the insurer. Since the law of waiver and estoppel cannot be abolished by contract, the stipulation which in case of additional insurance purports to hinge the validity of the policy upon the written consent of the secretary does not prevent the operation of the usual rules by which a waiver of that clause may be established. Such waiver may therefore be shown by parol, and even by acts, declarations, or conduct on the part of the insurer. *Insurance Co. v. Young*, 86 Ala. 424, 5 South. 116, 11 Am. St. Rep. 51; *Bouton v. Insurance Co.*, 25 Conn. 542; *Insurance Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689; *Insurance Co. v. Eggleston*, 96 U. S. 572, 24 L. Ed. 841; *Insurance Co. v. French*, 30 Ohio St. 240, 27 Am. Rep. 443; *Insurance Co. v. Earle*, 33 Mich. 153; *Williams v. Association*, 89 Me. 158, 36 Atl. 63.

A waiver may be founded upon an estoppel, but it is not so necessarily. Though the conduct of the insurer may not have actually misled the insured to his prejudice, or into an altered position, yet if, after knowledge of all the facts, its conduct has been such as to reasonably imply a purpose not to insist upon a forfeiture, the law, leaning against forfeitures, will apply the peculiar doctrine of waiver, invented probably to prevent them, and will hold the insurer irrevocably bound as by an election to treat the contract as if no cause of forfeiture had occurred. *Kiernan v. Insurance Co.*, 150 N. Y. 190, 44 N. E. 698; *Titus v. Insurance Co.*, 81 N. Y. 410.

Under this principle the sufficiency of the second, third, fourth, and fifth replications may be tested. They set up no estoppel, but they each aver the failure of the defendant to object to the additional insurance before the loss occurred, though it had been given notice of the subsequent insurance, and a reasonable time for objections had then elapsed.

The authorities appear to be generally agreed that such failure to act on the part of the insurer is evidence of an intention to waive the stipulations against additional insurance, but they are not entirely in accord as to whether such nonaction in itself will constitute a waiver, as a legal conclusion. In *Insurance Co. v. Young*, *supra*, it was said: "If the defendant did not have notice of the forfeiture until after the destruction of the goods, some affirmative act or conduct is requisite. In such case a waiver cannot be inferred from mere silence." But, where the notice is given the company before the loss, the reason is strong for holding it to the duty of expressing its dissent in some unequivocal way, if a forfeiture is to be claimed. The right of forfeiture residing alone with the company, it should not hold it in abeyance for an unreasonable time so as to thereafter be enabled to accept or reject the contract as may suit its interests, while the other party continues bound for the premium, and ought to know whether the property is protected. Acquiescence of the company in the continuance of the contract may be more readily presumed where it may

bring benefits than where nothing but loss is in sight, and the insured is therefore more likely to be misled by the lack of objection. The view that the silence of the company in such case should be treated as its assent to the additional insurance is reasonable, and it is well supported by authority. *Beach, Ins.* § 767; *Wood, Ins.* p. 807; *Insurance Co. v. Lyons*, 38 Tex. 253; *Cromwell v. Insurance Co.*, 47 Mo. App. 109; *Potter v. Insurance Co.*, 5 Hill (N. Y.) 147. See, also, *Insurance Co. v. Marple*, 1 Ind. App. 411, 27 N. E. 633; *Joliffe v. Insurance Co.*, 39 Wis. 111, 20 Am. Rep. 35; *Hayward v. Insurance Co.*, 52 Mo. 181, 14 Am. Rep. 400.

The last-mentioned replications were therefore each good, in avoidance of the plea, and the demurrers thereto were properly overruled.

* * * *

II. Prior Parol Waivers *

CALMENSON v. EQUITABLE MUT. FIRE INS. CO.

(Supreme Court of Minnesota, 1904. 92 Minn. 390, 100 N. W. 88.)

Action by Cain Calmenson against the Equitable Mutual Fire Insurance Company of Minneapolis. From an order dismissing the action, plaintiff appeals.

LEWIS, J. This action was brought to recover the amount of loss suffered by fire under a policy issued by respondent company. The defense was interposed that, subsequent to the issuance of the policy, appellant procured other insurance without respondent's assent. Reply alleged that assent had been given.

During the progress of the trial, appellant made the following offer of proof: That he had made application to the solicitor of respondent company for \$4,000 or \$5,000 insurance on his stock of goods at Lidgerwood, N. D.; that the solicitor asked the company's secretary if he would write the risk for that amount, and the secretary, after inquiring concerning the character of the building in which the goods were contained, said the company would place \$2,000 of the insurance, and appellant could get the remainder in some other company; that this fact was communicated to appellant by the solicitor, whereupon appellant made written application for \$2,000 insurance, which was submitted to the company, and was examined and approved by it; that the solicitor told appellant he could get \$2,000

* Reversed for other errors.

* For discussion of principles, see *Vance on Insurance*, § 122. See, also, *Cooley, Briefs on the Law of Insurance*, vol. 3, p. 2595 et seq.

other insurance, which he advised him to take in old-line companies; that appellant took the policy with the understanding that he had the right to take out additional insurance, and accordingly took out \$500 in another company. The offer was refused, and at the close of plaintiff's case, on motion, the court dismissed the action on the ground that appellant had not introduced evidence sufficient to sustain the cause.

The ruling of the trial court was correct. Plaintiff's cause of action was based upon the contract as evidenced by the policy, which provided: "This policy shall be void * * * if the assured now has or shall hereafter take any insurance on said property without the assent of the company." So far as appears from the policy, such assent might be oral; there being no requirement, as is usual, that it be in writing or be indorsed on the policy. The offer of proof that the assent was orally given by the secretary at the time verbal application was made for the insurance was inadmissible, for the reason that the application for and the contract of insurance were reduced to writing, and, under a familiar rule of evidence, all contemporaneous verbal statements, agreements, and understandings were merged in the writings. For application of the rule to written contracts of insurance, see *Union Nat. Bank v. German Ins. Co.*, 71 Fed. 473, 18 C. C. A. 203; *Insurance Company v. Mowry*, 96 U. S. 544, 24 L. Ed. 674; *Germania Ins. Co. v. Bromwell*, 62 Ark. 43, 34 S. W. 83. Order affirmed.

GERMANIA INS. CO. v. BROMWELL.

(Supreme Court of Arkansas, 1896. 62 Ark. 43, 34 S. W. 83.)

Action by C. E. Bromwell against the Germania Insurance Company. From a judgment for plaintiff, defendant appeals.*

RIDDICK, J. It is admitted by Bromwell, the assured, that he did not comply with the provisions of the iron safe clause in his policy. That clause required the assured to keep a set of books showing the changes taking place from time to time in the stock of goods insured. The reason of it is apparent, for without such books the amount of merchandise on hand at time of the fire could not be told. Similar provisions have been frequently held valid by this court. *Insurance Co. v. Parker*, 61 Ark. 207, 32 S. W. 509; *Assurance Co. v. Altheimer*, 58 Ark. 575, 25 S. W. 1067; *Insurance Co. v. Wilkerson*, 53 Ark. 353, 13 S. W. 1103.

As an excuse for failing to comply with this requirement of his policy, Bromwell testified that before the policy was issued the agent of the company told him that it was unnecessary to keep such books. But it was not competent thus to contradict the material stipulations

* Statement of facts rewritten.

of the policy by evidence of the parol declarations of the parties made at the time or before the policy was issued. The rule that "parol contemporaneous evidence is inadmissible to contradict or vary the terms of a valid written instrument" applies to contracts of insurance as well as to other written or printed contracts. *Robinson v. Insurance Co.*, 51 Ark. 441, 11 S. W. 686, 4 L. R. A. 251; *Southern Ins. Co. v. White*, 58 Ark. 281, 24 S. W. 425; *Weston v. Emes*, 1 Taunt. 115; *Insurance Co. v. Pruett*, 74 Ala. 497; *Thompson v. Insurance Co.*, 104 U. S. 259, 26 L. Ed. 765; *Insurance Co. v. Mowry*, 96 U. S. 547, 24 L. Ed. 674; 1 Wood, Ins. 10; 1 Greenl. Ev. § 275.

It is contended by counsel for appellee that this provision of the policy was waived by the declaration of the agent, made before the policy was issued, and that the company cannot now assert it; but we think that this contention is not sound. The case of *Sprott v. Association*, 53 Ark. 215, 13 S. W. 799, cited by counsel, does not support such contention, for there the written application for insurance, upon which the policy was issued, notified the insurer where the books would be kept. That was not an attempt to contradict the terms of the policy by evidence of parol contemporaneous statements, but by a writing which could be treated as a part of the contract. It is true there are many cases which hold that requirements as to notice and proof of loss may be waived. There are also many cases holding that an insurance company may, under certain circumstances, be estopped from taking advantage of a forfeiture or breach of a condition in the policy. "Any unequivocal and positive act of the company recognizing the policy as valid after a knowledge of its breach, or any act that puts the insured to unreasonable expense or trouble in the justifiable belief that the company still regards the policy as valid, will estop the company from taking advantage of the forfeiture." *Rich. Ins.* § 64; *Wood, Ins.* 1161; *Insurance Co. v. Brodie*, 52 Ark. 11, 11 S. W. 1016, 4 L. R. A. 458; *Insurance Co. v. Gibson*, 53 Ark. 494, 14 S. W. 672.

There are a large number of cases resting upon this rule, some of which have been cited by counsel, but there is a broad distinction between those cases and the one at bar. In those cases the acts of the agent or company which were treated as a waiver or were held to constitute an estoppel took place at the time of or after the breach of the condition, but the declarations of the agent relied on here to create an estoppel or waiver by the company took place not only before the breach of the condition occurred, but before the policy was issued. An estoppel can seldom arise, except when the representation relates to a matter of fact existing at the time or previously. Acts which waive a forfeiture must, of necessity, follow, or at least accompany the acts which would otherwise constitute the forfeiture, for there cannot be a waiver of a forfeiture until a forfeiture exists.

A company or its agents may, by acts clearly recognizing a policy as valid after notice of the facts, waive a breach of a condition in a

policy already existing, but it cannot well be contended that an agent could, by his acts or declarations, waive the stipulations of a policy not then in existence. *Bernard v. Association*, 11 Misc. Rep. 441, 32 N. Y. Supp. 223; *Insurance Co. v. Mowry*, 96 U. S. 547, 24 L. Ed. 674; *Bigelow, Estop.* (5th Ed.) 574; *Thompson v. Insurance Co.*, 104 U. S. 259, 26 L. Ed. 765; *Insurance Co. v. Pruett*, 74 Ala. 497.

This doctrine of estoppel and waiver has no application when the declaration of the agent relates to the rights depending upon contracts yet to be made, to which the person complaining is to be a party, for in such a case he has it in his power to protect himself by proper stipulations in the contract when reduced to writing. *Insurance Co. v. Mowry*, 96 U. S. 547, 24 L. Ed. 674; *Bigelow, Estop.* (5th Ed.) 574. The case last cited arose upon a life insurance policy. The agent had agreed that the insured should be notified by the company when each premium fell due. No such provision was put in the policy, but by an express condition of the policy the company was released from liability upon the failure of the insured to pay the premium when it matured. It was contended that the company could not insist upon this condition on account of the promise of the agent and the failure of the company to give the notice before the premium became due. "But," said the court, "to this position there is an obvious and complete answer. All previous verbal arrangements were merged in the written agreement. The understanding of the parties as to the amount of the insurance, the conditions upon which it should be payable, and the premium to be paid, were then expressed for the purpose of avoiding any controversy or question respecting them. The entire engagement of the parties, with all the conditions upon which its fulfillment could be claimed, must be conclusively presumed to be then stated. If by inadvertence or mistake provisions other than those intended were inserted, or stipulated provisions were omitted, the parties could have recourse for a correction of the agreement to a court of equity, which is competent to give all needful relief in such cases. But, until thus corrected the policy must be taken as expressing the final understanding of the assured and the insurance company." *Insurance Co. v. Mowry*, *supra*.

The above extract from the opinion of the United States supreme court asserts only well-known rules of law which must apply in this case. If the agent of the insurance company agreed with appellee that he need not keep books, he should have refused to accept a policy in which it was expressly stipulated that he should keep books. If through mistake he accepted a policy which did not express the contract made with the agent, he should have applied to a court of equity to have the contract reformed. Having brought his action at law upon the policy, and prosecuted it to judgment, he has elected to treat it as expressing the true contract between himself and the company, and he cannot now recede from it, or contradict it. *Washburn v. In-*

urance Co., 114 Mass. 175. We must therefore, in considering this case, disregard entirely the testimony of oral contemporaneous declarations which contradict the provisions of the policy, and we conclude that the judgment of the circuit court is without evidence to support it.

The appellee undertook that he would keep a set of books showing a complete record of his business. He failed to do so, and by the terms of his contract he cannot recover. The judgment is reversed, and the cause remanded for further proceedings.

III. Subsequent Parol Waivers[†]

GERMAN-AMERICAN INS. CO. v. HUMPHREY.

(Supreme Court of Arkansas, 1896. 62 Ark. 348, 35 S. W. 428, 54 Am. St. Rep. 297.)

Action by J. H. Humphrey against the German-American Insurance Company on a policy of fire insurance. Judgment for plaintiff, and defendant appeals.

WOOD, J. The plaintiff sued upon a fire insurance policy, for the loss of certain hotel furniture. The defense was based upon alleged noncompliance with the terms of the policy, which provided "that if the subject of the insurance be personal property, and be or become incumbered by a chattel mortgage," the policy should be void. The property covered by the policy was mortgaged after the issuance of the policy. But the plaintiff contends that the policy was only suspended during the continuance of the mortgage, and was revived by the discharge of the mortgage before the loss occurred. There was proof, though meager, to support the finding that the mortgage was canceled before the fire, although the record was not satisfied until after. The satisfaction of the record was not essential to the removal of the incumbrance. If the mortgage was paid off and canceled, it was sufficient. May, Ins. § 292; Hawkes v. Insurance Co., 11 Wis. 188; Smith v. Insurance Co., 60 Vt. 682, 15 Atl. 353, 1 L. R. A. 216, 6 Am. St. Rep. 144; Merrill v. Insurance Co., 73 N. Y. 452, 29 Am. Rep. 184.

But the proposition that the incumbrance, while it existed, only suspended the policy, contravenes the unambiguous terms of the contract, which the parties themselves have made. The language of the clause quoted supra, in its plain, ordinary and popular sense, indicates a total extinction of the policy if the property be incumbered, and

[†] For discussion of principles, see Vance on Insurance, § 123. See, also, Cooley, Briefs on the Law of Insurance, vol. 3, p. 2601 et seq.

not a suspended animation thereof, subject to be revived upon payment of the mortgage debt. Courts, by interpretation, cannot ingraft upon insurance contracts, any more than upon any other, a meaning totally foreign to that which the plain terms employed by the parties themselves convey. It is undoubtedly true that where the contract, on account of any ambiguity in the language used, is reasonably susceptible of different constructions, that construction should be adopted most favorable to the insured. *Imperial Fire Ins. Co. of London v. Coos Co.*, 151 U. S. 452, 14 Sup. Ct. 379, 38 L. Ed. 231; 1 May, Ins. §§ 175, 176, and authorities cited.

The insurer has the right to contract against any possible risk of loss or embarrassment incident to incumbering the property insured. If it be said that, where the mortgage is paid off, there is no longer an incumbrance and increase of risk, still as to whether or not the mortgage had been paid off would be the question, and one that often could not be settled without expensive litigation. The insured mortgagor might enter into collusion with the mortgagee to defraud the insurance company after the loss occurred, by claiming that the mortgage had been paid off and discharged, when in fact it had not. Unfortunately, all men are not honest. Without some such provision in the policy, the unscrupulous would have an inviting opportunity, after a loss, to divide the spoils, at the expense of the insurer. Doubtless some such considerations as these prompted the clause in the policy under consideration. The clause is reasonable and clear, and the parties had the right to thus contract. The opinion in *Imperial Fire Ins. Co. of London v. Coos Co.*, *supra*, and the numerous authorities there reviewed, leaves no doubt of the correctness of our ruling. Contra, counsel cite May on Fire Insurance, at page 589 (section 294), where he says, "An incumbrance in violation of the policy only suspends it, and, if paid before the loss, the policy revives." And the learned author cites *Kimball v. Monarch Ins. Co.*, 70 Iowa, 513, 30 N. W. 862. An examination of that case will show that after the mortgage had been paid off the insured assigned the policy, and the company indorsed upon it its assent to the assignment. This was tantamount to the issuance of a new policy. It was a waiver of forfeiture. So the case cited does not support the text.

2. It is also contended by the appellee that, if there was a forfeiture, it was waived by an agreement of the plaintiff with John L. Mills, clerk of the local agent, to the effect that the assured should see the mortgagee, and have the mortgage canceled, and that the policy should remain in force. And appellee says that said agreement on his part was performed before the loss occurred. Such an agreement if made by one having authority, would be a waiver of the forfeiture. *Pratt v. Insurance Co.*, 55 N. Y. 505, 14 Am. Rep. 304. Since counsel for appellants have not questioned here the sufficiency of the evidence to prove such an agreement, we will treat the verdict as conclusive on that point. Appellant questions only the authority

of the clerk of the local agent to make such agreement. The testimony as to the authority of the agent and his clerk is related by John L. Mills as follows: "R. H. M. Mills is my father, and I am a clerk in his office. I never make any agreement about insurance, other than the conditions in the policy. The only contract we have is the policy. I am not a partner with my father, but only a clerk. I merely sell the policies and receive the premiums. My brother and I merely do the office work for my father. I have no authority from the German-American Insurance Company. My father has never appointed me subagent for them. I have no power, from the agent or otherwise, to alter any of the terms of the printed contracts, nor to make any changes in a policy of insurance. I have no power to sign policies, but they are all signed by my father. I solicit insurance, and fill up blank policies for my father's signature. I filled up this one. This policy is signed by my father, who is the only person authorized to sign it. I am simply a soliciting agent and clerk, without any authority to modify the contract embodied in the policy."

The policy provides that "no agent shall have power to waive any provision or condition of this policy, except such as by the terms of this policy may be the subject of agreement indorsed hereon or added hereto; and, as to such provisions or conditions, no agent shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto. Nor shall any privilege or permission affecting the insurance under this policy exist or be claimed by the insured unless so written or attached."

Under the express terms of the policy, the placing of a mortgage upon the property, ipso facto, avoided the policy. The forfeiture thus created could only be waived by one who had authority to do so, and authority, too, as high as that by which the contract was made in the first instance. *Hamilton v. Insurance Co.*, 15 Mo. App. 59.

There is a marked distinction between a waiver of conditions made before and those made after the issuance of a policy. But an agent who has been furnished by his principal with blank applications, and with policies duly signed by its officers, and who has been authorized to take risks, and to issue policies by simply signing his name, to collect premiums, and to cancel policies,—all without consulting his principal,—would certainly be empowered to waive the condition as to incumbrance either before or after the issuance of the policy. And he could waive the forfeiture by parol, notwithstanding the limitations upon his power in this respect contained in the policy. *Insurance Co. v. Brodie*, 52 Ark. 11, 11 S. W. 1016, 4 L. R. A. 458, and authorities cited; *Grubbs v. Insurance Co.*, 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62, and authorities cited; *Insurance Co. v. Norwood*, 16 C. C. A. 136, 69 Fed. 71.

If R. H. M. Mills, the local agent, possessed this power, there is nothing in the record to show that he exercised it himself, or

that he assented to its exercise by his son. If he could delegate such power to his subordinate, the undisputed proof shows that he has not done so. The work of John L. Mills, as he shows, was clerical and special. There was nothing in the nature of his employment, or in the manner of the discharge of his duties, from which authority to waive a forfeiture could be inferred. Nor does it appear that the defendant company, or its local agent, held him out to the public as possessing such power.

The court's first instruction was correct. The second was not supported by the evidence. Reversed and remanded.

GRUBBS v. NORTH CAROLINA HOME INS. CO.

(Supreme Court of North Carolina, 1891. 108 N. C. 472, 13 S. E. 236, 23 Am. St. Rep. 62.)

Action by W. F. Grubbs against the North Carolina Home Insurance Company on a policy of fire insurance. From a judgment for plaintiff, defendant appeals.

EVERY, J.⁸ The defendant asked the court to instruct the jury that upon consideration of all the evidence there was no waiver of the condition of the policy requiring the written consent of the defendant to be indorsed upon it, provided the plaintiff should take out additional insurance in other companies. This request was equivalent to a demurrer to the whole of the evidence, it being admitted that additional insurance was taken out in other companies after the policy sued on was issued, without first securing the written indorsement of the defendant's consent upon it in accordance with the express requirements of one of its conditions.

If Dr. Ramsey, the agent with whom the plaintiff treated, was authorized to take fire risks and issue policies, he was empowered to waive by parol a condition in a policy issued by him. *Winans v. Insurance Co.*, 38 Wis. 342; *Miner v. Insurance Co.*, 27 Wis. 693, 9 Am. Rep. 479; *Gans v. Insurance Co.*, 43 Wis. 108, 28 Am. Rep. 535; *Insurance Co. v. Spiers*, 87 Ky. 285, 8 S. W. 453; *Kitchen v. Insurance Co.*, 57 Mich. 135, 23 N. W. 616, 58 Am. Rep. 344; *Insurance Co. v. Earle*, 33 Mich. 143; *Viele v. Insurance Co.*, 26 Iowa, 63, 96 Am. Dec. 83; *Wood, Ins.* § 391; *Shearman v. Insurance Co.*, 46 N. Y. 526, 7 Am. Rep. 380; *Fishbeck v. Insurance Co.*, 54 Cal. 422.

Where a general agent permits a subagent acting under his direction to receive premiums from and to fill up and deliver policies to the insured, the acts of the subagent are regarded as the acts of the general agent. *Insurance Co. v. Ruckman*, 127 Ill. 365, 20 N. E. 77, 11 Am. St. Rep. 121. The powers of an agent are prima

⁸ Part of the opinion is omitted.

facie co-extensive with the apparent authority given him, and persons dealing with him may judge of their extent from the nature of the business intrusted to his care. *Wood, Ins. § 500; Hornthal v. Insurance Co., 88 N. C. 71; Beal v. Insurance Co., 16 Wis. 241, 82 Am. Dec. 719; Davenport v. Insurance Co., 17 Iowa, 276.*

Though the authorities are conflicting upon many questions that have arisen as to the powers of insurance agents generally to bind the companies for which they act, there is a growing tendency to abrogate rules laid down by some of the courts, when the insured sought the principal officers of these corporations in the larger towns, and asked the agents to forward applications for insurance, instead of waiting at their homes for agents sent to solicit their patronage and stimulated to active and persistent effort by their employers. We concur with the judge below in the opinion that, if Dr. Ramsey was intrusted by the defendant (as he testified that he was) with the blank applications and with its policies duly signed by its officers, and was authorized to take risks without consulting the company, to issue policies by simply signing his name as agent, to collect premiums, and cancel policies, then he was empowered as agent to waive the condition that no additional insurance should be taken. In the case of *Insurance Co. v. Earle, supra*, an agent, when asked about the taking of additional insurance, said in substance that it would make no difference, but, without saying it in so many words, left the inference that consent in writing was not necessary, and the court held that the agent had waived a condition in the policy similar to that in plaintiff's policy, and that the insurers could not avoid liability under the contract because additional insurance was subsequently taken in another company, without asking for or securing the indorsement of its written consent on the original policy. See, also, *Gans v. Insurance Co., supra*.

After testifying that he was permitted by the defendant to exercise all of the powers enumerated by the court in the foregoing instructions, Dr. Ramsey stated also that Grubbs did say to him that he would want further insurance, and that he (Ramsey) replied that he thought Grubbs could get it if he wished; that he did not remember any more of the conversation on that subject. The witness Gay testified that Ramsey said to Grubbs, when asked about further insurance, that it was all right so that he did not insure for more than three-fourths the value of the stock. Grubbs testifies that he told Ramsey the exact amount of insurance that he proposed to place and did take in each of the other companies, which did not in the aggregate exceed three-fourths of the value of the property insured.

So that the facts in our case would more naturally warrant the inference that the agent did not require his assent to be indorsed in writing on the policy than the evidence in the Michigan authority cited above, because Ramsey not only conveyed the idea that it would be all right to get additional insurance, but added the condi-

tion that the whole insurance should not in the aggregate exceed three-fourths of the value of the property insured, thereby excluding the inference that he would insist upon any other condition. But, even upon his own testimony, Ramsey was empowered to waive the indorsement; and if, after Grubbs notified him of the amount which he proposed to take and did afterwards take in each of the other companies, Ramsey by his language left Grubbs to infer that no objection would be made unless the aggregate amount of insurance in all of the companies should exceed three-fourths of the value of the insured property, and Grubbs did not exceed the limit, then, if Grubbs was induced to believe that the forfeiture would not be insisted on unless the limit in the amount of insurance should be transcended, and acted under that impression in effecting additional insurance, that condition of the policy would be considered as waived by the company. * * *

If after a breach of the conditions of a policy the insurers, with a knowledge of the facts constituting it, by their conduct lead the insured to believe that they still recognize the validity of the policy, and consider him as protected by it, and induce him under such impression to incur expense, they will be deemed to have waived the forfeiture, and will be estopped from setting it up as a defense. *Viele v. Insurance Co.*, 26 Iowa, 9, and note page 68, 96 Am. Dec. 83; *Oshkosh Gas-Light Co. v. Germania Fire Ins. Co.*, 71 Wis. 454, 37 N. W. 819, 5 Am. St. Rep. 233.

Where, with a knowledge of the facts constituting the alleged waiver, the insurer, after the insured property had been destroyed by fire, requires the insured to furnish invoice of goods destroyed, proofs of loss, or plans and specifications of the building burned, or to appear for examination, such acts of its adjuster amount to a concession that the forfeiture for failure to secure the indorsement of additional risks will not be insisted upon. *Insurance Co. v. Kittle*, 39 Mich. 51; *Titus v. Insurance Co.*, 81 N. Y. 410; *Cannon v. Insurance Co.*, 53 Wis. 585, 11 N. W. 11; *Webster v. Insurance Co.*, 36 Wis. 67, 17 Am. Rep. 479.

Where, after a fire, the adjuster of a company joins the agents of other companies in the effort to adjust the loss, requires the production of books for examination, and asks for invoices from the time the insured went into business, and, the invoices not being furnished because of their destruction by fire, then asks for duplicates, which the insured endeavored by correspondence with creditors to get, and objects to settling on the ground only that he cannot agree with the insured as to the amount of loss, and offers to pay for his company its proportion of the loss as estimated by him, the company represented by such adjuster is estopped from insisting upon a forfeiture by reason of the breach of any conditions in the policy in reference to taking additional insurance. *Fishbeck v. Insurance Co.*,

supra; *Argall v. Insurance Co.*, 84 N. C. 355. See, especially, opinion of Cooley, J., in *Insurance Co. v. Kittle*, supra.

The testimony admitted after objection and constituting the ground of exceptions 4, 5, and 7, will therefore appear at a glance to be competent, if our view of the law in reference to waiver by conduct subsequent to the loss, and inconsistent with the idea of insisting upon a forfeiture for failure to comply with the conditions set forth in the policy, be correct. It would follow also from the principle laid down by us that there was no error in so much of his honor's charge as relates to the doctrine of waiver by the acts of the defendant's agents after the property was destroyed. * * * Affirmed.

WILLIAMS v. MAINE STATE RELIEF ASS'N.

(Supreme Judicial Court of Maine, 1896. 89 Me. 158, 36 Atl. 63.)

Action by Flavilla Williams against the Maine State Relief Association. Submitted on an agreed statement.

FOSTER, J. This is an action to recover the amount of \$1,500 alleged to be due the plaintiff as the beneficiary under a benefit certificate issued by the defendant, a mutual benefit association, to her husband, Eugene Williams, deceased.

The promise to pay the plaintiff is conditioned upon the member being in good standing in the association at the time of his death. The defense is that he was not in good standing at that time. The reply is that the defendant has waived that defense.

It appears that on July 15, 1893, two assessments, numbered 90 and 91, were laid on the members of the association, which were due and payable August 15, 1893, and upon the failure of the assured to pay the same on or before September 15, 1893, his membership would be forfeited in accordance with the by-laws of the association; that the insured did not pay the assessments on or before September 15, 1893, although due notice thereof was sent to him by mail; and it is claimed on behalf of the defendant that, the assessments not being paid on or before said 15th day of September, a second notice was duly and seasonably mailed to the insured, but the reception of this is denied by the plaintiff. On September 1, 1893, two other assessments, numbered 92 and 93, were laid upon the insured, which were due and payable October 1, 1893, of which he had due notice. On October 16, 1893, assessments numbered 94 and 95 were also laid upon the insured, payable November 15, 1893, and a regular notice thereof mailed to him on October 19th, by the secretary of the association.

The secretary would testify, as the agreed statement sets forth, that this last notice was sent to the insured unintentionally and by mistake.

The insured paid assessments numbered 90, 91, 92, and 93 on Octo-

ber 24, 1893, to the assistant secretary of the association, at Lewiston, and the money thus received was by him sent to the secretary at Portland, on the same day, and, so far as appears from any evidence in the case, went into the hands of the defendant association, and was retained unconditionally, till returned to the assistant secretary by the secretary immediately after the death of the insured, which occurred November 10, 1893.

The by-laws show that it was the duty of the secretary to pay to the treasurer of the association on the 1st and 15th of each month, all moneys collected, taking his receipt therefor. As the money paid on these assessments was not returned to the assistant secretary till after the death of the insured, it is presumed to have come into the defendant's possession on the 1st day of November, for the law presumes that every man in his official character does his duty, until the contrary is shown.

The matter of reinstatement of the insured was never laid before or considered by the executive board.

Assuming that the payment of the assessments on October 24, 1893, was too late to meet the requirement of the by-laws of the association, the question remains whether the defendant, by the subsequent assessment of October 16, 1893, the reception and retention of the money paid upon the other assessments, with no notice of any objection brought home to the assured, waived the conditions of forfeiture, and its right to avoid the certificate of insurance on that ground.

We think it did.

Even where assessments have been levied and paid subsequent to those unpaid, and upon which a forfeiture might have been claimed, it has been held that such subsequent assessments and acceptance of money paid upon them constituted a waiver of such right to avoid a certificate for delay of payment. *Rice v. Society*, 146 Mass. 248, 15 N. E. 624.

In that case the court say: "Suppose the payment of the former assessment had never been made at all, and the company, without insisting upon the nonpayment as a ground of forfeiture, had levied new assessments upon the assured, which were all duly paid and accepted without condition, could it be contended that there was no waiver? An unconditional acceptance upon assessment waives all former known grounds of forfeiture, and this effect is not varied or limited because an acceptance of a former assessment had been on condition, and had not amounted to such waiver."

This principle has oftentimes been applied in cases of similar character, where a forfeiture has been sought on the part of the insurer against the insured. It was applied in *Hodsdon v. Insurance Co.*, 97 Mass. 144, 93 Am. Dec. 73, where it was held that, although an agent of the company had no authority to bind it by receiving payment of a premium after it was due, the company might waive it at any time; and, if the company received it from their agent after it was due, it

was bound to inform itself of the time when it had been paid to him; and that by receiving it from him without inquiry it waived the right to insist on delay of payment as a ground of forfeiture of the policy.

So in *Insurance Co. v. Wolff*, 95 U. S. 326, 24 L. Ed. 387, where forfeiture was set up for nonpayment of the premium at the time it became due, but which was subsequently paid to an agent of the company, and a receipt delivered for the same. There the premium was tendered back after the death of the insured, and the receipt demanded. But the court held that the company, by the receipt of the premium, waived the forfeiture for nonpayment at the stipulated time.

And in *Insurance Co. v. Raddin*, 120 U. S. 183, 7 Sup. Ct. 500, 30 L. Ed. 644, the court held that the acceptance by insurers of payment of a premium, after they know that there has been a breach of a condition of the policy, is a waiver of the right to avoid the policy for that breach. "To hold otherwise," say the court, "would be to maintain that the contract of insurance requires good faith of the assured only, and not of the insurers, and to permit insurers, knowing all the facts, to continue to receive new benefits from the contract, while they decline to bear its burdens."

This principle is too firmly established to be questioned, and the authorities are numerous where this doctrine has been applied, and such is the current of modern decisions. Among the cases where this rule has been applied, in addition to the foregoing, are the following, as a few of the more important ones: *Bouton v. Insurance Co.*, 25 Conn. 542; *Bevin v. Insurance Co.*, 23 Conn. 244; *Viele v. Insurance Co.*, 26 Iowa, 9, 96 Am. Dec. 83; *Insurance Co. v. Slockbower*, 26 Pa. 199; *Frost v. Insurance Co.*, 5 Denio (N. Y.) 154, 49 Am. Dec. 234; *Wing v. Harvey*, 5 De Gex, M. & G. 265, 270; *Shea v. Association*, 160 Mass. 289, 294, 35 N. E. 855, 39 Am. St. Rep. 475; *Rice v. Society*, 146 Mass. 248, 15 N. E. 624; *Insurance Co. v. Norton*, 96 U. S. 234, 24 L. Ed. 689; *Appleton v. Insurance Co.*, 59 N. H. 541, 47 Am. Rep. 220.

In *Shea v. Association*, *supra*, where the defense set up forfeiture for nonpayment within the stipulated time, the court held that, where the company receives and retains the money, but seeks to make its acceptance conditional, it must see to it that notice to that effect is actually brought home to the insured, and that the acceptance of money under an assessment after the expiration of the time of payment constitutes a waiver of all objection growing out of the delay.

The conditions of forfeiture contained in the contract of insurance are for the benefit of the association, and, of course, can be waived by it either before or after they are broken. Being inserted for its benefit, it lies with the association to say whether or not they shall be enforced or waived. Forfeitures are not favored in law, for, as was said in *Insurance Co. v. Norton*, 96 U. S. 234, 242 (24 L. Ed. 689), "they are often the means of great oppression and injustice."

It is true that in life insurance time of payment is, as a general

rule, material, and cannot be extended by courts against the assent of the company. But it is equally true that, where such assent is given, or where it may be inferred from the acts and conduct of the parties to the contract, courts are liberal in construing the transaction in favor of avoiding a forfeiture. *Leslie v. Insurance Co.*, 63 N. Y. 27; *Helme v. Insurance Co.*, 61 Pa. 107, 100 Am. Dec. 621. And, while a waiver is the intentional relinquishment of a known right, it may be inferred from any circumstances which show that the parties understood the payment of a premium, when due, would not be required, or a forfeiture claimed. *Currier v. Insurance Co.*, 53 N. H. 538, 549, 552; *Pierce v. Insurance Co.*, 50 N. H. 297, 9 Am. Rep. 235; *Heaton v. Insurance Co.*, 7 R. I. 502; *North Berwick Co. v. New England F. & M. Ins. Co.*, 52 Me. 336, 340; *Insurance Co. v. Wolff*, 95 U. S. 326, 330, 24 L. Ed. 387.

But it is claimed in defense that the payment of the assessments to the assistant secretary was unauthorized, he having no authority to bind the association by the receipt of money upon assessments unless the same was paid within the time limited for their payment.

This would undoubtedly be true, were it not for the fact that the money thus paid to him was immediately forwarded to the secretary of the association, whose duty it was to turn the money over to the treasurer at the beginning and middle of each month. It was paid to the man whose duty it was to receive it in the due course of business. No notice was ever brought home to the assured by the association or any of its officers that it was not properly paid. Notwithstanding the case shows that the money was returned to the assistant secretary immediately after the death of the insured, the assistant secretary claims it was not thus returned till three months after his death. From the evidence and the presumption of law that those acting officially do their duty till the contrary is proved, it would appear that the money was in the hands of the treasurer at the death of the insured. If in the treasurer's hands, it was received by the association. *Swett v. Society*, 78 Me. 541, 7 Atl. 394. In this particular the case at bar is to be distinguished from the case of *Lyon v. Society*, 153 Mass. 83, 26 N. E. 236, cited by counsel for defense. In that case the money never went into the possession of the company or its treasurer.

The difficulty, where a waiver is alleged, in the absence of written proof of the fact, generally arises from the effect to be given to the acts of agents in their dealings with the assured. Undoubtedly such agents, if they bind the company, whether it be a mutual benefit or stock company, must have authority to waive a compliance with the conditions upon a breach of which a forfeiture is claimed, or to waive the forfeiture when once incurred, or their acts and dealings in waiving such compliance or forfeiture must be subsequently ratified or approved by the company. *Swett v. Society*, supra. It is upon this latter ground that many of the decisions have turned when the ques-

tion of waiver of compliance or of forfeiture has come before the courts. The law of agency, to be sure, is the same whether applied to the act of the agent in undertaking to continue the insurance or to any other act for which the principal is sought to be held responsible.

The rule that no one shall be permitted to deny that he intended the natural consequences of his acts, which have induced others to act upon them, is as applicable to insurance companies as to individuals.

If applied to the case at bar, this principle will serve to solve the question presented. The association, notwithstanding the assistant secretary was not authorized to waive a compliance with the conditions annexed to the contract of insurance, received from their agents the money paid by the assured upon assessments levied upon him. It was not received upon any conditions accompanying such acceptance, as in the case of *Shea v. Association*, *supra*. Nor was it ever returned to the assured, nor was there any notice of objection to its payment, acceptance, or retention ever given to the assured. From anything that appears in the case, it still remains in the hands of the association or its agents.

The analogy between the case under consideration and that of *Rice v. Society*, 146 Mass. 248, 15 N. E. 624, is very striking. In that case, as in this, the defendant was a mutual insurance company. There was default of payment of premiums when due, and subsequent assessment by the company, as in this, and payment made and received after such default. There was no determination by the company that the certificate, for the time being, should be considered or treated as not in force or suspended; and in making the subsequent assessments there was no act of the company manifesting intention to exclude the assured; nor was there any condition annexed to the assessments subsequently made, or to the acceptance of the payment of them by the assured. And there, as in other cases to which we have referred, the company was held to have waived its right to insist upon a forfeiture of the certificate upon the ground that the subsequent assessments and acceptance of the money paid upon them, constituted such waiver.

The language of the court in the case of *Insurance Co. v. Wolff*, 95 U. S. 326, 330, 24 L. Ed. 387, may well be applied to the case at bar. "If, therefore," say the court, "the conduct of the company in its dealings with the assured in this case * * * has been such as to induce a belief that so much of the contract as provides for a forfeiture if the premium be not paid on the day it is due would not be enforced if payment were made within a reasonable period afterwards, the company ought not, in common justice, to be permitted to allege such forfeiture against one who has acted upon the belief, and subsequently made the payment. And if the acts creating such belief were done by the agent, and were subsequently approved by the company, either expressly or by receiving and retaining the premiums, the same consequences should follow."

As the case is before this court on an agreed statement of facts, the exceptions having been waived, the entry should be, judgment for plaintiff.⁹

IV. Contemporaneous Parol Waivers ¹⁰

GURNETT v. ATLAS MUT. INS. CO.

(Supreme Court of Iowa, 1904. 124 Iowa, 547, 100 N. W. 542.)

Action by T. F. Gurnett against the Atlas Mutual Insurance Company. The defendant company issued a policy for \$1,500 on plaintiff's property, for a term of one year from February 9, 1902. The property was destroyed by fire June 10, 1902. There was a judgment for plaintiff, and defendant appeals.¹¹

LADD, J. The policy of insurance sued on contained the following conditions: "The total insurance permitted not to exceed at any time three-fourths of the cash value of the property insured and to be concurrent herewith. * * * It is understood, and the insured by accepting this policy so agrees, unless permission signed by the secretary be endorsed hereon or added to or attached hereto, if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy, in excess of the amount permitted above, or in case the other insurance is permitted and the additional insurance be not valid and collectible insurance, * * * then, and in either such case, it shall be held to be an election upon the part of the insured to cancel said policy and the same shall be void and shall stand cancelled upon the happening of any of the foregoing events. * * * This company shall not be liable under this policy for a greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance, whether valid or not, by solvent or insolvent insurers, covering said property."

There was other insurance amounting to \$2,700, of which a policy of \$1,000 issued by the Des Moines Fire Insurance Company was invalid, because the additional insurance exceeded that permitted. The plaintiff received something from it, however, in settlement of his claim of loss. The jury, in answer to special interrogatories, found

⁹ To the same effect, see *Ætna Life Ins. Co. v. Fallow*, 110 Tenn. 720, 77 S. W. 937 (1903). For a discussion of principles, see Cooley, *Briefs on the Law of Insurance*, vol. 3, p. 2699 et seq.

¹⁰ For discussion of principles, see Vance on Insurance, § 124. See, also, Cooley, *Briefs on the Law of Insurance*, vol. 3, p. 2619 et seq.

¹¹ The statement of facts is rewritten.

the value of the property to have been \$5,000 at the date of the policy and \$3,070.97 when destroyed. It will be observed that when destroyed the property, valued at \$3,070.97, was insured for \$4,200, and therefore that the insurance exceeded three-fourths of the value. For this reason the appellant insists that the policy was void. Doubtless this would be true were defendant in a situation to urge the defense.

The principle is well settled that when an insurance policy contains a condition which renders it void at its inception, and this is known to the insurer, it will be held to have waived such condition by receiving the premium and issuing its policy. *Williams v. Niagara Fire Ins. Co.*, 50 Iowa, 561, 568; *Carey v. Home Ins. Co.*, 97 Iowa, 619, 66 N. W. 920; *Hagan v. Merchants' Ins. Co.*, 81 Iowa, 321, 331, 46 N. W. 1114, 25 Am. St. Rep. 493. See, also, *Independent School Dist. v. Fidelity Ins. Co.*, 113 Iowa, 65, 84 N. W. 956; *Fitchner v. Fidelity Mutual Fire Ass'n*, 103 Iowa, 276, 72 N. W. 530. The evidence without dispute showed that when the defendant's agent negotiated the insurance he was informed that the property was worth but \$5,000, and it was then covered by three policies issued by other companies, amounting in the aggregate to \$2,700. Knowledge of the agent is to be imputed to the company, and in issuing its policy of \$1,500 in addition to the above amount the defendant must be held to have done so knowing that this increased the insurance to more than three-fourths of the value of the property. The law is charitable enough to assume, in the absence of any showing to the contrary, that an insurance company intends to execute a valid contract in return for the premium received; and when the policy contains a condition which renders it void at its inception, and this result is known to the insurer, it will be presumed to have intended to waive the condition, and to execute a binding contract, rather than to have deceived the insured into thinking his property is insured when it is not, and to have taken his money without consideration.

Appellant suggests that a distinction should be made, in the matter of imputing the agent's knowledge to the insurer, between a recording and a soliciting agent. Possibly, but this court has held otherwise, as appears from the cited cases, following the ruling of a bare majority of the court in *Jordan v. State Insurance Co.*, 64 Iowa, 216, 19 N. W. 917. It should be added that all the record shows with respect to the class to which defendant's agent belonged is that the agent at one time solicited an application, and that the policy was mailed to him. He was informed of the facts when arranging for the insurance, and, as he was acting for the company in that particular transaction, it will be charged with the knowledge he acquired therein. To the suggestion that a waiver of excessive insurance when the policy issued will not include a subsequent excess, it is to be said that the latter, under the terms of the policy, invalidates it only when occasioned by additional insurance; and none such was taken out by plaintiff. More-

over, it does not appear that the insurance was less than or merely equaled three-fourths of the value of the property at any time, and therefore the condition of things to which the company assented continued up to the time of the loss.

2. It is further urged that, as the policy issued by the Des Moines Fire Insurance Company was invalid, the plaintiff, under the terms of the policy, should be held to have canceled it, and the policy sued on be declared void. But the clause of the contract, "or in case the other insurance was permitted and the additional insurance be not valid and collectible insurance, * * * it shall be an election to cancel said policy," relates to insurance procured subsequent to the issuance of the policy. *Funk v. Association*, 103 Iowa, 660, 72 N. W. 774.

The policy stipulated that the company should not be liable for more than its pro rata share of the entire insurance, valid or invalid, and appellant argues that it should be required to pay but $\frac{15}{42}$ of the loss, instead of $\frac{15}{32}$, as held by the district court. One thousand dollars of the insurance was invalid, and section 1746 of the Code provides that "no condition or stipulation in the policy of insurance fixing the amount of the liability or recovery under such policy with reference to the pro rata with other insurance on property insured shall be valid except as to other valid and collectible insurance, any agreement to the contrary notwithstanding." The stipulation of the policy in so far as it undertook to include the void policy in the matter of prorating ought not to be enforced. That the Des Moines Fire Insurance Company may have regarded its policy valid, or paid something in compromise to avoid litigation, can make no difference. The statute is to be read into the contract, and the rights of the parties thereunder became fixed at the time of the loss, and could not be affected by what might subsequently happen between the insured and third parties; especially when the total amount received by the insured does not equal the loss suffered. *Hayes v. Milford Ins. Co.*, 170 Mass. 492, 49 N. E. 754; *Thomas v. Builders' Ins. Co.*, 119 Mass. 121, 20 Am. Rep. 317; *Turner v. Meridan Fire Ins. Co. (C. C.)* 16 Fed. 460. Affirmed.

FORWARD v. CONTINENTAL INS. CO.

(Court of Appeals of New York, 1894. 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637.)

Action by John D. Forward against the Continental Insurance Company on a fire policy. Verdict for plaintiff. The general term (66 Hun, 546, 21 N. Y. Supp. 664) overruled exceptions by defendant, and defendant appeals.

O'BRIEN, J. The judgment in this case was recovered upon a policy of insurance issued April 23, 1891, at one year, upon a store and

the goods therein, which were owned by the plaintiff. By the terms of the policy the risk was distributed as follows: Upon the store, a sum not exceeding \$1,000; the goods, a sum not exceeding \$1,200; and the furniture and safe, a sum not exceeding \$100. The entire property was destroyed by fire on the 27th of September, 1891. The complaint alleges, and the answer admits, that the loss was adjusted and determined between the plaintiff and a general agent of the defendant on the 6th of October following at \$1,950, and the recovery was for this sum and interest.

The only defense interposed by the answer, or urged upon the argument of the appeal in this court, was a breach on the part of the plaintiff of one, or perhaps two, of the conditions contained in the following clause of the policy: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void * * * if the interest of the insured be other than unconditional, sole ownership, * * * or if the subject of insurance be personal property, and be or become incumbered by a chattel mortgage. * * * In any matter relating to this insurance, no person, unless duly authorized in writing, shall be deemed the agent of this company. * * * This policy is made and accepted subject to the foregoing stipulations and conditions, together with such other provisions, agreements, or conditions as may be indorsed hereon or added hereto; and no officer, agent, or other representative of this company, shall have power to waive any provision or condition of this policy, except such as, by the terms of this policy, may be the subject of agreement, indorsed hereon or added hereto; and, as to such provisions and conditions, no officer, agent, or other representative of this company shall have such power, or be deemed or held to have waived such provisions or conditions, unless such waiver, if any, shall be written upon or attached hereto. Nor shall any privilege or permission affecting the insurance under the policy exist, or be claimed by the insured, unless so written or attached."

It was shown at the trial that the plaintiff, about two months before the policy had been issued to him, had executed and delivered to his brother an instrument in the form of a bill of sale upon the stock of goods, furniture, and fixtures in the store, which on March 3, 1891, was filed in the town clerk's office. This instrument, in consideration of \$500, purports to transfer the plaintiff's interest in the property absolutely to his brother. The proof at the trial tended to show that there was in fact no consideration for the transfer; that it was colorable, merely, and made between the two brothers with reference to some litigations pending or threatened against the plaintiff. The brother never in fact paid anything as a consideration for the transfer, and no debt was due or owing to him by the plaintiff. He never in fact claimed any title to the property, or any right to its possession, which always remained in the plaintiff. There was also proof that the existence of this bill of sale, and its true consid-

eration, character, and purpose, were disclosed to the defendant's agent before the policy was issued or delivered.

The court submitted two questions to the jury: (1) Whether the defendant, notwithstanding the condition of the policy, had knowledge of all the facts respecting the existence, nature, and purpose of the bill of sale; instructing them that the knowledge of the agent was the knowledge of the company, and that, if they found that the defendant had knowledge of the facts, the policy was not avoided. (2) Whether a statement contained in the proofs of loss, to the effect that there was no incumbrance on the property at the time, was willfully false, and known to be so by the plaintiff when he made the proofs, and was made for the purpose of defrauding the defendant; instructing them that, if it was not, then it did not amount to false swearing, within the intent and meaning of a condition in the policy. The verdict was in favor of the plaintiff, and hence all the disputed facts material to the questions of law must be deemed to be established in the plaintiff's favor.

It was said by Judge Andrews in *Walsh v. Insurance Co.*, 73 N. Y. 11, upon the authority of many cases, that "conditions for the prepayment of premium, and the like, which enter into the validity of a contract of insurance at its inception, may be waived by agents, and are waived, if so intended, although they remain in the policy when delivered, and that a contract for renewal is, for the purpose, to be treated as the original contract." It has uniformly been held by this court that a condition of this character in a contract of insurance will not operate to avoid it after a loss, providing the company, before delivering the policy, had knowledge of the fact that the insured, notwithstanding the warranty, or the statement and the condition, was not the sole owner, or that it was incumbered. In such cases the company is deemed to have waived the condition, or by the delivery of the policy with the condition avoiding it in case the insured is not the sole owner, or that the property is incumbered, and accepting the premium, is held estopped from setting up the condition as a defense. It was never supposed that such a condition was intended to apply to a state of facts in regard to which the company had been fully informed when it accepted the risk. The cases on this point are numerous, and it is impossible to make any distinction in principle between the conditions considered and that involved in the case at bar. *Van Schoick v. Insurance Co.*, 68 N. Y. 434; *Whithed v. Insurance Co.*, 76 N. Y. 415, 32 Am. Rep. 330; *Woodruff v. Insurance Co.*, 83 N. Y. 134; *Short v. Insurance Co.*, 90 N. Y. 16, 43 Am. Rep. 138; *McNally v. Insurance Co.*, 137 N. Y. 389, 33 N. E. 475; *Carpenter v. Insurance Co.*, 135 N. Y. 298, 31 N. E. 1015; *Cross v. Insurance Co.*, 132 N. Y. 133, 30 N. E. 390; *Berry v. Insurance Co.*, 132 N. Y. 49, 30 N. E. 254, 28 Am. St. Rep. 548.

In these cases it was held, either that the company had waived the condition, or was estopped by the delivery of the policy and the re-

ceipt of the premium, since, under such circumstances, it could not be supposed that it intended to deliver to the insured a policy which it knew to be void. When the underwriter, before the inception of the contract, is informed by the owner that the property is incumbered, but still delivers the policy with the condition embodied in it, then, as it seems to me, it is not so much a question of waiver or estoppel, as a question whether the condition ever attached or operated, upon the facts thus disclosed. It can, of course, operate in the future upon transfers or incumbrances, as the facts arise, and then the question is one of waiver. But, when the facts are all known before any contract is made, a condition against a state of things known by all the parties to exist cannot be deemed to be within their intention or purpose. This case cannot be taken out of the rule, by any possible distinction, unless it be by the character and powers of the agent of the defendant, to whom, upon the finding of the jury, the facts were communicated.

It is urged that the cases cited do not apply, for the reason that the waiver there was by a general agent. That may be true with respect to the four cases last cited. But it does not seem to me to be so much a question of power or authority in an agent to waive a condition in the contract, as of knowledge by the company, through its agent, of the real facts. In the Carpenter Case, *supra*, the information as to the true state of the title was given to a mere clerk of the general agent; and we held that such knowledge was imputable to the company through the general agent, for whom the clerk acted in soliciting the insurance, and that a condition of this character remaining in the policy did not avoid it. Now, the powers of the agent in this case were certainly much broader than those of the clerk in the case referred to. In this case the person to whom the information was communicated was certainly an agent appointed by the defendant itself, while in that the person had no authority directly from the company, but was a mere servant or clerk, acting for, and solely under the authority of, the agent. The agent, in this case, and the clerk, in the other, were engaged in precisely the same duty, and performing the same service, when they acquired the knowledge as to the condition of the property and the state of the title. They were both soliciting insurance, and ascertaining the character and condition of the property upon which the risk was about to be taken; and I am unable to suggest any reason for imputing knowledge in the one case, and not in the other. Moreover, the record is entirely silent as to any facts tending to show that in this case the agent was acting in pursuance of a special or limited power. On the face of the policy, he appears to be the duly-authorized agent of the defendant, and actually did grant special permits, and waive conditions in the policy. He had power to waive conditions, providing it was done in the manner stipulated in the policy; that is to say, in writing. He had power to solicit insurance, collect premiums, and deliver policies. There is no

proof in the record that the plaintiff ever made application for this policy, written or otherwise, or that he touched the company at any point, or in any form, except through this agent. The fair inference from the proof is that the defendant furnished the agent with policies duly executed, which he filled up and delivered at his discretion, reporting the facts to the company. There is nothing on the face of the policy, and nothing was communicated to the plaintiff, to lead him to believe that the powers of the agent were special or restricted. Insurance companies, doing business by agencies at a distance from their principal place of business, are responsible for the acts of the agent, within the general scope of the business intrusted to his care; and no limitations of his authority will be binding on parties with whom he deals, which are not brought to their knowledge. *Insurance Co. v. Wilkinson*, 13 Wall. 222, 20 L. Ed. 617; *Merserau v. Insurance Co.*, 66 N. Y. 278; *Bodine v. Insurance Co.*, 51 N. Y. 117, 10 Am. Rep. 566; *Arff v. Insurance Co.*, 125 N. Y. 57, 25 N. E. 1073, 10 L. R. A. 609, 21 Am. St. Rep. 721.

It was held in the case of *Ellis v. Insurance Co.*, 50 N. Y. 402, 10 Am. Rep. 495, that an agent with precisely such powers as I have supposed the agent in this case possessed, could bind the company by a parol contract of insurance, while an application for a policy was pending, but none delivered till after a loss. I am unable to discover in the record any basis for the contention that the knowledge of the agent as to the existence and purpose of the bill of sale is not the knowledge of the defendant. On the contrary, his knowledge of the facts is, I think, imputable to his principal. So far as appears, the plaintiff dealt with him as the representative of the company. If there were in fact any limitations or restrictions on his powers as an ordinary agent, it was for the defendant to show it. His commission was not put in evidence, nor any proof given tending to show that he was not what he was described in the complaint,—the defendant's duly authorized manager or agent at the place where the contract was made. There were no other means of communication between the plaintiff and the defendant employed. So far as appears, he made the contract for his principal, and the knowledge that he obtained in the course of the business was the knowledge of the defendant.

There is another view of the question that deserves some notice. Conditions in contracts of insurance against liability when the property is incumbered, or where the title is not absolute in the insured, are inserted for the purpose of guarding against the moral hazard involved. When the transfer or incumbrance is merely colorable or nominal, and not real or effective, the reasons that induced the stipulation do not apply. Was there any real sale or transfer of this property, within the meaning of the policy? Nothing was done, except to execute and file a paper. There was no intention, in fact, to transfer the title, or vest any beneficial interest in the nominal vendee. There was no debt to be enforced, no consideration passed, and the

use and possession remained unchanged. The filing of the paper added nothing to its validity. It was not a mortgage, nor intended as security for any debt. It was a mere paper transfer, without consideration, and without delivery of possession; and while it had the form, it had none of the legal elements, necessary, even between the parties, to constitute a valid contract of sale. In legal effect, it was, I think, the same as an unexecuted gift. The worst that can be said of it is that it was intended to defraud creditors; but, if that be true, still the moral hazard which was the basis of the condition of the policy would still be absent, since the plaintiff's interest in the property at the time of the insurance was in fact the same as before the paper was executed.

There is no legal ground upon which this court can properly disturb the verdict, and the judgment should therefore be affirmed.

V. What Constitutes a Waiver¹²

SHIMP v. CEDAR RAPIDS INS. CO.

(Supreme Court of Illinois, 1888. 124 Ill. 354, 16 N. E. 229.)

MULKEY, J. This was an action of assumpsit brought by the appellant, Julia C. Shimp, in the Champaign circuit court against the Cedar Rapids Insurance Company to recover a loss by fire under a policy issued to her by the company, June 16, 1882, on her dwelling, furniture, etc., to the amount of \$1,500. The premium was \$21.50, \$10 of which was paid in cash, and a note given for \$11.50, payable June 1, 1883, with this provision in it: "This note is given for insurance, and in case of loss under the policy for which it is given becomes due and payable on the date of such loss,"—which we understand to mean that if a loss occurred for which the company was liable the note was to become due on the date of such loss. The property covered by the risk was destroyed by fire on the 18th of February, 1883. Suit was commenced on the 12th of April following, and the premium note was paid by appellant to appellee through a bank on the 28th day of May, 1883, being a month and a half after the suit was commenced. The plaintiff having been unsuccessful in both the lower courts, brings the case here for review.

Appellee set up as a defense in the trial court certain breaches of the conditions in the policy. Appellee's counsel do not question the truth of the facts constituting the defense thus set up, but insist that

¹² For discussion of principles, see Vance on Insurance, §§ 125, 126.

the company is not in a position to avail itself of that or any other defense by reason of its having accepted payment of the premium note after having obtained full knowledge of all the facts and circumstances constituting the defenses made to the action. Indeed, it is conceded that if the company has not waived the right to set up the defenses relied on by reason of having accepted such payment, the judgments below are right and ought to be affirmed. A recurrence to a few well-settled principles it is believed will relieve the question thus presented of all real or apparent difficulty.

That the company had a complete defense to the action on the policy at the time the suit was commenced is admitted. But this, like most other rights, is one that might be abandoned, released, or waived. There is no pretense that it has been released, intentionally abandoned, or expressly waived; so that if there has been a waiver at all, it is what is known to the law as an implied waiver. This class of waivers is frequently to be met with in the law of insurance. Thus, where the assured has been guilty of some breach or breaches of the conditions of the policy, and the insurer, with full knowledge thereof, during the pendency of the risk, accepts a maturing premium, or does any other act recognizing the continued existence and validity of the policy, such acceptance or other act will operate as a waiver of the right of forfeiture occasioned by said breaches, unless something appears to show that it was not intended to have that effect, and that the assured so understood it. This well-recognized rule in the law of insurance is founded, at least in part, upon the fundamental principle that one having the exclusive right to terminate an executory contract must abrogate it altogether, if at all. He cannot be heard to say it is valid for one purpose, and in the same breath that it is invalid for all other purposes. But it is founded chiefly upon the general principles of common honesty and natural justice which the law exacts of mankind in their intercourse and dealings with one another.

The doctrine of waiver, however, in our opinion, has no application whatever to the facts of this case. The act of the company relied on as a waiver of its right of defense occurred long after the risk under the policy had terminated by the happening of the contingency insured against; long after the defendant had refused payment of the loss on the ground there had been a forfeiture of the policy, and in the face of an action brought to enforce the payment of such loss.

The cases relied on by appellant's counsel differ materially in their facts from the present case, and in our opinion fall far short of sustaining the position in support of which they are cited. The policy being a valid obligation and binding contract between the parties, upon its delivery to the assured, the risk attached and commenced running, and would have continued to run until the loss occurred, but for the breach of its conditions by the assured which rendered it void at the election of the company, and it is not claimed that there was any waiver of such breach until after the commencement of the present

suit. The insurer is not required in such case to formally declare a forfeiture. It is sufficient to set it up by way of defense, when sued for the loss, as was done in this case.

The waiver or estoppel relied on cannot prevail. It is destitute of that element which is most essential to either. It does not appear, nor is it claimed, that the assured has been misled in any manner to its prejudice by the company's accepting payment of the note. What other course of conduct could the appellant have pursued than that which she did? She simply prosecuted the suit previously commenced by her against the company to its termination; the company from the beginning denying its liability. As the payment of the note is the only ground on which she now claims she ought to recover, it is clear such payment could not have contributed to her failure to succeed in the courts below. The grounds of recovery now urged are in legal effect an admission that there was no right of recovery when her suit was commenced. The payment to the company, therefore, so far from misleading her to her injury, has, according to her present contention, greatly improved her prospect of success. Upon the delivery of the policy, and commencement of the risk, the appellee acquired a present vested right in the premium as an entirety. The payment of part of it was merely postponed, and consequently the company had the right to receive the money. But, however this may be, we are clearly of the opinion that the receiving of it did not operate as a waiver of the breaches of the conditions of the policy.

The view here taken is fully supported by the late case of *Insurance Co. v. Amerman*, 119 Ill. 329, 10 N. E. 225, 59 Am. Rep. 799, and the authorities there cited. Judgment affirmed.

RIGHTS UNDER THE POLICY

I. Vested Rights of the Beneficiary¹

1. IN GENERAL

RICKER v. CHARTER OAK LIFE INS. CO.

(Supreme Court of Minnesota, 1880. 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289.)

CORNELL, J. The original policy was issued upon the application of Samuel Stanchfield, the person whose life was insured, and all the provisions stipulated for were paid by him before the death of Elizabeth A. Stanchfield, who was his wife. By its terms the amount of the insurance was made payable upon the death of the insured to Elizabeth A. Stanchfield, his said wife, and in case of her death before his decease the same was to be paid to his children, or to their guardian, if minors, for their use and benefit. The said Elizabeth died intestate in July, 1874, leaving surviving her said husband, the plaintiffs herein, and one Joel B. Stanchfield, who were the issue of their marriage. After this Samuel Stanchfield married the intervenor herein, by whom he had one child, Carl S. Stanchfield, both of whom are now living. On the thirteenth day of February, 1878, Samuel Stanchfield died. After the decease of his former wife and his marriage with the intervenor, Louisa Stanchfield, the insured surrendered the original policy, which was cancelled, and a new one was issued in its place and as a substitute therefor, bearing the same date, and containing the same terms and conditions, save that it was therein provided that it should enure "to the sole and separate use and benefit" of said intervenor, Louisa Stanchfield, his second wife. The legal effect of this surrender and change, and the competency of Samuel Stanchfield to make it without the consent of his children, are the important questions presented for adjudication in this case.

Upon the allegations and admissions in the pleadings it must be presumed that the original policy was made, and its stipulations were to be performed, in the state of Connecticut, where the defendant company was created, organized, and did its business, and hence its legal effect, and the rights and obligations of the parties under it, depend upon the laws of that state; but as no evidence appears to have been given as to what those laws were, they are to be taken as identical

¹ For discussion of principles, see Vance on Insurance, §§ 132-134. See, also, Cooley, Briefs on the Law of Insurance, vol. 4, p. 3735 et seq.

with the common law of this state, independent of any statute upon the subject. Upon this theory the case has been argued, and it will be considered and determined accordingly.

The general rule upon the subject, as stated by Mr. Bliss, is this: "That a policy of life insurance, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as beneficiary or beneficiaries, and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person or persons so named. The person designated in the policy is the proper person to receipt for and to sue for the money. The principle is that the rights under the policy become vested immediately upon its being issued, so that no person other than those designated in it can assign or surrender it, and that in such assignment or surrender all the persons must concur, or the interest of those not concurring is not affected." Bliss on Life Ins. (2d Ed.) §§ 317, 337. This is held to be the rule in Succession of Kugler, 23 La. Ann. 455.

Upon the facts in the case at bar, however, the court is not called upon to consider the rule as applied to a case where a portion of the premiums which constitute the consideration for the insurance still remains unpaid, and where the policy is liable to forfeiture in case of non-payment. Here the entire amount of the premiums stipulated for in the policy had been paid before the death of the wife, Elizabeth A. Stanchfield, and the subsequent attempted surrender of the policy by her husband, whose life was insured. The case, therefore, stands in the same position it would if the whole consideration for the policy had been paid by the party procuring it at the time of its execution and delivery by the company, and the question is, having made such payment and taken out a policy for the benefit of his said wife and his children, payable in express terms to her, or, in the event of her prior decease, to his children, it was competent for him to surrender the same and take another policy in consideration of such surrender, and in lieu of the original, for the benefit of another party. This question, it seems to the court, must be answered in the negative.

The transaction on the part of Mr. Stanchfield was in the nature of an irrevocable and executed voluntary settlement upon his wife and children of the sum secured to be paid by the policy at his death, conditioned that the same should be to her for her benefit should she survive him; but if, not, then the same should be paid to his children, or, if minors, to their guardian, for their sole use and benefit. Nothing remained to be done on his part to make the intended gift of the policy to the beneficiaries therein named complete and effectual as against himself and all mere volunteers claiming under him. In paying for the insurance and procuring the policy to be issued, payable, in express terms, upon his death, to his said wife, Elizabeth, if then living, and if not to his children, for their sole use and benefit, without any condition or stipulation reserving a right to change or alter any of the

terms of the agreement, he did all that could well be done, under the circumstances, in the execution of an intention to vest in his said appointees the entire interest in the policy, and all rights thereunder. *Adams v. Brackett's Ex'r*, 5 Metc. (Mass.) 280; *Landrum v. Knowles*, 22 N. J. Eq. 594.

What he did was a "clear and distinct act," wholly divesting himself of all ownership or control over the money paid for the insurance, disclaiming any interest in the policy, or intention to take or hold it for himself or his legal representatives, at the same time putting it beyond his power so to do by the stipulation obligating the company to pay the sum insured, whenever it should become due, to such of the persons named in the policy as might then be entitled thereto by its terms. Taking the delivery of the policy from the company, under these circumstances, can only be construed as an act of acceptance for the designated beneficiaries, and his subsequent holding of the same as that of a naked depositary, without any interest, for those entitled thereto. Such conduct on the part of the husband and father was both natural and proper, and it raises no presumption against the theory of a completed transaction on his part, as evidenced by his other acts. As the insured had no legal or equitable interest in the policy at the time of its surrender and cancellation, the act was a nullity, and could not affect the rights of his children, to whom it then belonged, and who alone could release the company from the obligations it contained.

We concur in the opinion of the district court, that "his children" included the issue of both marriages. Order affirmed.

2. EFFECT OF MURDER OF INSURED BY BENEFICIARY

ANDERSON v. LIFE INS. CO. OF VIRGINIA.

(Supreme Court of North Carolina, 1910. 152 N. C. 1, 67 S. E. 53.)

Action by L. W. Anderson, administrator of Penelope Barnes, deceased, against the Life Insurance Company of Virginia and N. R. Parker, administrator of Seth Newby, deceased. On appeal from a justice, facts were agreed on, and plaintiff had judgment. Defendant Parker appeals.

The facts formally agreed upon were as follows: "That on February 1, 1909, Penelope Newby, now Barnes, obtained from the Life Insurance Company of Virginia a policy of insurance on her life for the benefit of Seth Newby, her brother; that both Penelope Barnes and Seth Newby died on July 3, 1909; that Seth Newby died by his own hand before Penelope Barnes died; that Penelope Barnes was murdered by Seth Newby; that the Life Insurance Company of Virginia

has paid to N. R. Parker, administrator of Seth Newby, deceased, the sum of \$110, the amount due under the said policy of insurance, with understanding by all parties that Parker shall hold money to abide determination of this action, and that the policy of insurance hereto attached is an exact copy of the original policy of insurance, and the same is hereby made a part of this statement of facts."

HOKE, J. It is a principle very generally accepted that a beneficiary who has caused or procured the death of the insured under circumstances amounting to a felony will be allowed no recovery on the policy. Vance on Insurance, pp. 392, 393; Cooley's Insurance Briefs, 3153; 25 Cyc. 153; 3 A. & E. (2d Ed.) p. 1021.

This wholesome doctrine, referred by most of the cases to the maxim "*Nullus commodum capere potest de injuria sua propria*," has been uniformly upheld, so far as we are aware, except in certain cases where the interest involved was conferred by statute, and the statute itself does not recognize any exception. Such an instance has occurred in our own court, in the case of *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794, where a widow, convicted as accessory before the fact to her husband's murder, was awarded dower under the statute—a decision which caused an immediate amendment of the statute (Pub. Laws 1889, c. 499), and this amendment has since prevailed as the law of the state on that subject. The authorities are also to the effect that in cases like the present, where the contract is made between the insured and the company for another's benefit—that is, a valid contract of that character—a felony of the kind indicated on the part of the beneficiary will not relieve the company of all liability on the policy, but recovery can be had usually by the representative of the insured, and for the benefit of the latter's estate. Vance and Cooley, *supra*; Schmidt, Adm'r, v. Ins. Co., 112 Iowa, 41, 83 N. W. 800, 51 L. R. A. 141, 84 Am. St. Rep. 323; Supreme Lodge v. Menkhausen, 209 Ill. 277, 70 N. E. 567, 65 L. R. A. 508, 101 Am. St. Rep. 239; Ins. Co. v. Davis, Adm'r, 96 Va. 737, 32 S. E. 475, 44 L. R. A. 305; Shea v. Mass. Benefit Asso., 160 Mass. 289, 35 N. E. 855, 39 Am. St. Rep. 475; Tyler v. Odd Fellows Relief, etc., 145 Mass. 134, 13 N. E. 360; Cleaver et al. v. Mutual Res. Fund, L. R. Q. B. (1892) p. 147.

This latter ruling would very likely not obtain in an ordinary life policy, where a valid contract of insurance had been made, and purported to be between the company and the beneficiary, and such beneficiary was, and continued to be throughout, the owner of the policy and of all interest in it. Such a position, however, is not presented here in any aspect of it, as the company recognizes its liability on the policy, and the question is on the right to the fund as between the representative of the insured and of the beneficiary.

On that question, and under the authorities cited, there is no error in the ruling of the court below, awarding the fund to the representative of the insured, and the judgment to that effect is affirmed. Judgment affirmed.

II. Beneficiaries in Mutual Benefit Associations ²

1. IN GENERAL

HOEFT v. SUPREME LODGE KNIGHTS OF HONOR

(Supreme Court of California, 1896. 113 Cal. 91, 45 Pac. 185, 33 L. R. A. 174.)

Action by Catherine Hoeft against the Supreme Lodge Knights of Honor and others on a benefit certificate. From a judgment for plaintiff, defendants appeal.

HENSHAW, J.³ Appeal from the judgment given in favor of plaintiff upon the pleadings. Plaintiff, the widow of Henry Hoeft, sued defendant, a benefit association, to recover \$2,000 upon a certificate issued in her name, at request of the insured member, Henry Hoeft. The defendant Supreme Lodge, for answer, paid the money into court, and asked that the children of Henry Hoeft be allowed to appear and contest. This was permitted, and the children—defendants and appellants herein—interposed a general demurrer to plaintiff's complaint, and thereafter filed an answer and cross complaint. The court, upon motion, gave plaintiff judgment upon the pleadings, and this appeal followed. * * *

The principal question presented is raised by the new matter pleaded by defendants in their cross complaint. They set forth that plaintiff is their stepmother. Originally their father—the insured—procured a certificate to be issued in the name of their mother, his then wife. Upon her death a certificate was issued in their favor. In the course of time he married plaintiff, and thereafter surrendered the certificate in favor of them, and caused the certificate under which plaintiff claims to be issued to her. The last change, it is averred, was accomplished through the fraudulent representations, undue influence, coercion and duress practiced and exercised upon their father by his wife, this plaintiff. The specific averments to support this charge are to the last degree meager and inconclusive; but, passing that, under an assumption of their sufficiency, we come to consider whether a cause of action is stated. If so, the judgment must be reversed; if not, it was properly given.

Defendants do not plead any contract with their deceased father, or any special equities which would deprive him of the right to make a change, but stand upon the ground that they may contest because the change was procured by fraud. But, if it was a fraud, did they

² For discussion of principles, see Vance on Insurance, §§ 137, 138. See, also, Cooley, Briefs on the Law of Insurance, vol. 4, p. 3756 et seq.

³ Part of the opinion is omitted.

have a right to complain? Clearly they had not, unless either by contract or in law they had some vested interest or right in the certificate which had formerly been taken out in their favor. They claim no such vested interest by contract. If it exists at all, then, it exists by operation of law. But such rights are either constitutional or statutory, and we are referred to no law which secures to them a right of action for such a cause.

If they had a vested right in the certificate as such, then the insured himself, of his own volition, and without the fraudulent contrivance of a third person, could not substitute a new beneficiary. But this is not and cannot be claimed, for the contract is between the order and the insured. The beneficiary's interest is the mere expectancy of an incompleting gift, which is revocable at the will of the insured, and which does not and cannot become vested as a right until fixed by his death. If it is said that a devisee under a will has, during the life of the testator, a like naked expectancy, it may be freely conceded that it is so; but to the heirs and devisees is confirmed a right of action for fraud, etc., by the provisions of the Code. Otherwise they, too, would come within the scope of the general principle that a right of action for fraud is personal and untransferable. One cannot be defrauded of that in which he has no vested right. A vested right is property, which the law protects, while a mere expectancy is not property, and therefore is not protected.

These views will be found supported without conflict by a multitude of authorities from which may be cited: *Nibl. Mut. Ben. Soc.* (2d Ed.) § 234a; *Brown v. Grand Lodge*, 80 Iowa, 287, 45 N. W. 884, 20 Am. St. Rep. 420; *Schillinger v. Boes*, 85 Ky. 357, 3 S. W. 427; *Robinson v. Association* (C. C.) 68 Fed. 825; *Supreme Conclave v. Cappella* (C. C.) 41 Fed. 1; *Lamont v. Grand Lodge* (C. C.) 31 Fed. 177; *Knights of Honor v. Watson*, 64 N. H. 517, 15 Atl. 125; *Beatty's Appeal*, 122 Pa. 428, 15 Atl. 861; *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620. In our own state the cases of *Swift v. Exchange Board*, 67 Cal. 567, 8 Pac. 94; *Order of Mutual Companions v. Griest*, 76 Cal. 494, 18 Pac. 652; *Bowman v. Moore*, 87 Cal. 306, 25 Pac. 409; and *McLaughlin v. McLaughlin*, 104 Cal. 171, 37 Pac. 865, 43 Am. St. Rep. 83,—recognize the same general principles.

Jory v. Supreme Council, 105 Cal. 20, 38 Pac. 524, 26 L. R. A. 733, 45 Am. St. Rep. 17, and the cases involving a like consideration, differ radically from the case at bar. There is no conflict in the decisions nor confusion in the principles. In the *Jory Case* the insured endeavored to change the beneficiary, and did everything possible to that end except to surrender the outstanding certificate. This he was prevented from doing by the fraud and contrivance of the beneficiary named therein, who refused to part with it. As between the two claimants to the fund, namely, the holder of the earlier certificate which the insured had in effect canceled, and the beneficiary last

named, equity, not demanding impossibilities, and not permitting one to take advantage of his own wrong, decreed that the latter had the better right. In other words, it gave complete effect to the acts of the insured.

In this case appellants ask to have the acts of the insured nullified,—an essentially different demand. The judgment appealed from is affirmed.⁴

2. CHANGE OF BENEFICIARY⁵

SANBORN v. BLACK.

(Supreme Court of New Hampshire, 1894. 67 N. H. 537, 35 Atl. 942.)

Bill of interpleader by Edward B. S. Sanborn against Louisa F. Black, Sarah M. Bruce, and others.

The Odd Fellows' Mutual Relief Association of the Connecticut River Valley has paid to the plaintiff, for the benefit of the party entitled to it, \$975, upon a certificate of membership issued to the plaintiff's intestate, Frederick A. Black, February 8, 1877, by which the association promised to pay \$1,000, upon Black's decease, to the person or persons designated by him in his application for membership, or in his last legal assignment, provided such person or persons should be heirs or relatives of him, or dependents upon him. The by-laws of the association contained the following provisions: "If either of the persons so designated have died prior to the death of the member, the sum which would have been paid to said decedent's beneficiary, had he or she been living at the time of the member's death, shall be payable to other beneficiaries, if there are any named, in equal proportions, but, if there are no other beneficiaries named, to the next of kin of the deceased member. A member shall not change his beneficiary * * * without the consent of the directors, and a record being made of the same on the books of the association."

In his application, Black designated his wife, Julia, as beneficiary. She died in 1885, and he subsequently married the defendant Louisa. September 27, 1889, he indorsed upon the certificate and signed the following, "It is my will that the benefit named in this instrument be paid to my wife, Louisa F. Black," and sent it to the association, at Springfield, Mass., to get the consent of the directors to the change.

⁴ See, also, *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657, 9 Am. St. Rep. 620 (1888).

⁵ For discussion of principles, see *Vance on Insurance*, § 138. See, also, *Cooley, Briefs on the Law of Insurance*, vol. 4, p. 3767 et seq.

and have it recorded. He died October 3, 1889. The directors, not holding any meeting in the meantime, did not consent to the change before his death. Three of them consented in writing September 20, 1890. Louisa and the next of kin appear, each claiming the money in the plaintiff's possession.

CHASE, J. It is claimed that Black's designation of his second wife as beneficiary is not effectual, because it was not consented to and recorded, as required by a by-law of the association, before his death. The association's promise to pay the sum named in the certificate of membership to some one—either the designated beneficiary or the member's next of kin—is absolute. It also gives the member authority to choose, and from time to time to change, his beneficiary, provided the person appointed is a relative of, or a dependant upon, him. This feature distinguishes the contract from ordinary contracts of life insurance. *Marsh v. Legion of Honor*, 149 Mass. 512, 515, 21 N. E. 1070, 1071, 4 L. R. A. 382. It deprives any one from acquiring a vested interest in the insurance during the lifetime of the member. *Barton v. Association*, 63 N. H. 535, 3 Atl. 627; *Knights of Honor v. Watson*, 64 N. H. 517, 519, 15 Atl. 125, 126. Compare *Bank v. Whittle*, 63 N. H. 587, 3 Atl. 645.

Authority in the association or its directors to defeat the member's choice by arbitrarily withholding consent would be inconsistent, not only with the right expressly granted to him, but also with the general nature and purpose of the contract. It would "go to the destruction of the thing granted, and, * * * according to the well-known rule, the thing granted would pass discharged of the condition." *Dallman v. King*, 4 Bing. N. C. 105, 109; *Moore v. Woolsey*, 4 El. & Bl. 243, 256; *Braunstein v. Insurance Co.*, 1 Best & S. 782, 795; *Boynton v. Insurance Co.*, 43 Vt. 256, 262, 5 Am. Rep. 276; *Thomas v. Fleury*, 26 N. Y. 26, 34; *Bowery National Bank v. Mayor, etc., of City of New York*, 63 N. Y. 336, 339, 340; *Nolan v. Whitney*, 88 N. Y. 648. It is not claimed that any reason existed in this case for withholding consent. The person designated as beneficiary is one of a class entitled to become such, and, so far as appears, is unexceptionable in all respects.

One purpose of the by-law was to secure to the association reliable evidence of every change in beneficiaries, so that it would know to whom it was liable upon the death of a member, and be protected, to some extent, at least, from litigation by adverse claimants. *Anthony v. Association*, 158 Mass. 322, 324, 33 N. E. 577, 578; *American Legion v. Smith*, 45 N. J. Eq. 466, 17 Atl. 770; *Supreme Conclave v. Cappella* (C. C.) 41 Fed. 1, 4. Here this purpose was fully accomplished. Black's designation was sufficient in form and substance. It was forwarded to and received by the association several days before his death. He did all that he was required to do—all that he could do—to complete the transfer of the association's obligation

to Louisa. There being no sufficient reason to justify other action on the part of the directors, he had the right to have the transfer consented to by them, and recorded.

The only reason suggested why consent was not given, and record was not made, is because the directors did not meet before his death, after receiving the assignment. If they had met, and declined or neglected to consent, and Black had lived, law or equity would have furnished him an adequate remedy to secure his right. *Walker v. Walker*, 63 N. H. 321, 56 Am. Rep. 514. Upon his death, Louisa's expectancy became a vested right. She became entitled (as he was in his lifetime) to insist that the directors should perform their duty under the contract. *Scott v. Association*, 63 N. H. 556, 4 Atl. 792; *Connelly v. Association*, 58 Conn. 552, 20 Atl. 671, 9 L. R. A. 428, 18 Am. St. Rep. 296; *Vivar v. Knights of Pythias*, 52 N. J. Law. 455, 20 Atl. 36. Under the circumstances, equity treats that as done which ought to have been done. *Supreme Conclave v. Cappella* (C. C.) 41 Fed. 1; *Isgrigg v. Schooley*, 125 Ind. 94, 25 N. E. 151. Case discharged.

McGOWAN v. SUPREME COURT I. O. O. F.

(Supreme Court of Wisconsin, 1899. 104 Wis. 173, 80 N. W. 603.)

Action by Addie McGowan against the Supreme Court of the Independent Order of Foresters upon a benefit certificate issued by the defendant to one Edward C. Pion, on the 3d day of June, 1896: the defendant being a fraternal association issuing life insurance certificates to its members upon the assessment plan. The certificate, when issued, was made payable to one Frances Heid, the affianced wife of said Pion. The complaint alleges that on January 31, 1898, Pion duly changed the beneficiary, in accordance with the rules and regulations of the order, and thereby made his insurance payable to the plaintiff, his sister, and that Pion died February 9, 1898. The amended answer admits the issuance of the certificate of insurance, and the death of the insured, and the furnishing of sufficient proofs of death, but denies that the beneficiary was ever changed, and, further, sets up the defense of false statements made by the insured in his application for insurance, by which the policy was avoided.

The rules of the order prescribing the manner in which the insured may make a change of beneficiary were put in evidence, and they provide, in substance, that such change may be made in the following manner: (1) By filing a written application with the local court for such change; (2) paying a fee of 50 cents; (3) surrendering the old certificate; (4) furnishing satisfactory evidence that he, and not the beneficiary, has paid the assessments; (5) whereupon the local court shall cause the application, duly certified by the court officers and sealed, to be transmitted, with the certificate, to the head office:

(6) on the receipt of which, if approved by the supreme chief ranger, the supreme secretary shall incorporate in the certificate the desired change. The rules further provide that, upon the issuance of the second certificate, the first should thereby become null and void, and that no certificate should be assigned, nor the beneficiary changed, except in the manner so provided.

It appears by the evidence that the insured removed from Galena, Ill., to La Crosse, Wis., some time after the issuance of the original certificate, and lived with the plaintiff, his sister. From October, 1897, until his death, February 9, 1898, he seems to have lived in La Crosse with the plaintiff, his sister. The head of the defendant order is called the "Supreme Chief Ranger," and he has his office at Toronto, Canada. In January, 1898, one Robert Kidney, a deputy of the supreme chief ranger, whose business, under the rules of the order, is to incorporate subordinate courts, look after those already in existence, and generally to represent the supreme chief ranger in that respect, came to La Crosse, and saw the insured, on the 31st of January, at the home of his sister. The insured on that day told him that he wished to change the beneficiary in his certificate, and make the policy over to his sister, the plaintiff. Mr. Kidney produced the proper blank, and it was filled out, the 50 cent fee was paid, and the application was at once transmitted to the local court at Galena for the signature of the court officers and the seal. The certificate was not surrendered, because it was then in the possession of Frances Heid, at Galena. The application reached Galena, and the proper certificate was placed thereon by the officers of the court, and the sum was transmitted to the supreme chief ranger, and reached him February 7, 1898. The original certificate reached Mr. Pion on the 7th or 8th of February, but in what manner it was obtained from Miss Heid does not appear. He immediately delivered it to Kidney, who, on the morning of the 9th of February, being the day of Pion's death, mailed it to the proper officers at Toronto, where it was received February 11th; Pion having died, as before stated, February 9th. No new certificate was ever issued, nor does it appear that the original certificate was ever returned.

Judgment for the plaintiff for \$2,099 damages and costs was rendered, from which judgment the defendant appeals.

WINSLOW, J.* * * * It is now well settled that one who is insured in a mutual benefit association, and who wishes to change the beneficiary, must make the change in the manner required by his policy and the rules of the association, and that any material deviation from this course will render the attempted change ineffective. It is equally well settled that there are cases where literal and exact conformity with the requirements of the policy may be excused. In the case of *Supreme Conclave v. Cappella* (C. C.) 41 Fed. 1, the subject

* The statement of facts is rewritten and part of the opinion is omitted.

is exhaustively reviewed, and the conclusion reached that there were three exceptions to the rule of exact compliance: First, where the society has waived strict compliance by issuing a new certificate without insisting on the performance of all the intermediate steps; second, where, by loss of the first certificate without fault, its surrender becomes impossible, a court of equity will not require an impossibility, but will treat the change as made if the insured has taken all the other necessary steps, and does all in his power to make the change; third, where the insured has pursued the course required by the policy and the rules of the association, and does all in his power to make the change, but before the new certificate is actually issued he dies, a court of equity will decree that to be done which ought to be done, and will act as though a new certificate had been issued. *Association v. Kirgin*, 28 Mo. App. 80; *Isgrigg v. Schooley*, 125 Ind. 94, 25 N. E. 151; *Grand Lodge v. Noll*, 90 Mich. 37, 51 N. W. 268, 15 L. R. A. 350, note 30 Am. St. Rep. 419; *Marsh v. Supreme Council*, 149 Mass. 512, 21 N. E. 1070, 4 L. R. A. 382; *Luhrs v. Luhrs*, 123 N. Y. 367, 25 N. E. 388, 9 L. R. A. 534, 20 Am. St. Rep. 754; *Bac. Ben. Soc. (New Ed.)* §§ 310, 310a.

The case at bar clearly comes within the last of the above classes. The insured had done every substantial act required of him by the terms of the policy and the rules of the society in order to make a complete change of beneficiaries. The last act was the surrender to the deputy chief ranger of the original certificate, at least one day before his death. He could do nothing further. On the part of the society, there were simply formal acts to be performed. There was no discretion as to whether the society would allow the change. It is true that the rules say that the change shall be made and a new certificate issued if the application be approved by the supreme chief ranger, but this approval plainly relates to matters of form only. It was the right of the insured to make the change before his death if he took the required steps, and if the new beneficiary was competent to be such under the rules of the order. We hold, therefore, that, under the rules laid down in *Supreme Conclave v. Cappella*, *supra*, the insured in the present case had made an effective and complete change of beneficiaries.

But it is urged that the cases in which this doctrine has been applied are all cases where the money has been brought into court, and the other claimant has been interpleaded, and thus the action has become an equitable one, in which equitable principles may be and are applied, while the present action is an action at law, where strictly legal principles must prevail. The objection does not seem forcible. Either there was a change of beneficiaries or there was not. There is no middle course. Nor do we see how there could well be a change in equity and no change at law, or a change which should operate as to some parties and not to other parties to the transaction. There-

fore we hold that the facts here shown prove a change of beneficiaries, even though the action be one at law.⁷ * * * [Judgment reversed on other points.]

III. Policy Payable to a Third Person ⁸

CENTRAL NAT. BANK v. HUME.

(Supreme Court of United States, 1888. 128 U. S. 195, 9 Sup. Ct. 41, 32 L. Ed. 370.)

On the 23d of April, 1872, the Life Insurance Company of Virginia issued a policy of insurance on the life of Thomas L. Hume, of Washington, D. C., for the term of his natural life, in the sum of \$10,000, for the sole use and benefit of his wife, Annie Graham Hume, and his children, payment to be made to them, their heirs, executors, or assigns.

The charter of the company provided as follows: "Any policy of insurance issued by the Life Insurance Company of Virginia on the life of any person, expressed to be for the benefit of any married woman, whether the same be effected originally by herself or her husband, or by any other person, or whether the premiums thereafter be paid by herself or her husband or any other person as aforesaid, shall inure for her sole and separate use and benefit, and that of her or husband's children, if any, as may be expressed in said policy, and shall be held by her free from the control or claim of her husband or his creditors, or of the person effecting the same and his creditors." Section 7.

The application for this policy was made on behalf of the wife and children by Thomas L. Hume, who signed the same for them. On the 28th of March, 1880, the Hartford Life & Annuity Company of Hartford, Conn., issued five certificates of insurance upon the life of Thomas L. Hume, of \$1,000 each, payable to his wife, Annie G. Hume, if living, but otherwise to his legal representatives. On the 17th of February, 1881, the Maryland Life Insurance Company of Baltimore issued a policy of insurance upon the life of Thomas L. Hume, in the sum of \$10,000, for the term of his natural life, payable to "the said insured, Annie G. Hume, for her sole use, her executors, admin-

⁷ To the same effect, see *Waldum v. Homstad*, 119 Wis. 312, 96 N. W. 806 (1903). See, also, *John Hancock Mutual Life Ins. Co. v. White*, 20 R. I. 457, 40 Atl. 5 (1898). And see *Hoeft v. Supreme Lodge Knights of Honor*, ante, p. 286.

⁸ For discussion of principles, see *Vance on Insurance*, §§ 139-141. See, also, *Cooley, Briefs on the Law of Insurance*, vol. 4, p. 3787 et seq.

istrators, or assigns;" the said policy being issued, as it recites on its face, in consideration of the sum of \$337.20 to them duly paid by said Annie G. Hume, and of an annual premium of the same amount to be paid each year during the continuance of the policy. The application for this policy was signed "Annie G. Hume, by Thomas L. Hume," as is a recognized usage in such applications, and in accordance with instructions to that effect printed upon the policy.

The charter of the Maryland Life Insurance Company provides as follows: "Sec. 17. That it shall be lawful for any married woman, by herself, or in her name or in the name of any third person, with his consent, as her trustee, to be caused to be insured in said company, for her sole use, the life of her husband, for any definite period, or for the term of his natural life; and, in case of her surviving her husband, the sum or net amount of the insurance becoming due and payable by the terms of the insurance shall be payable to her to and for her own use, free from the claims of the representatives of her husband, or of any of his creditors. In case of the death of the wife before the decease of the husband, the amount of the insurance may be made payable, after the death of the husband, to her children, or, if under age, to their guardian, for their use. In the event of there being no children, she may have power to devise, and, if dying intestate, then to go [to] the next of kin."

On the 13th of June, 1881, the Connecticut Mutual Life Insurance Company of Hartford issued a policy of insurance upon the life of Thomas L. Hume, in the sum of \$10,000, for the term of his natural life, payable at Hartford to Annie G. Hume and her children by him, or their legal representatives. The application for this policy was signed "Annie G. Hume, by Thomas L. Hume." It was expressly provided, as part of the contract, that the policy was issued and delivered at Hartford, in the state of Connecticut, and was "to be in all respects construed and determined in accordance with the laws of that state."

The "statute of Connecticut, respecting policies of insurance issued for the benefit of married women," was printed upon the policy under that heading, and is as follows: "Any policy of life insurance expressed to be for the benefit of a married woman, or assigned to her or in trust for her, shall inure to her separate use, or, in case of her decease before payment, to the use of her children or of her husband's children, as may be provided in such policy: provided, that if the annual premium on such policy shall exceed three hundred dollars, the amount of such excess, with interest, shall inure to the benefit of the creditors of the person paying the premiums; but if she shall die before the person insured, leaving no children of herself or husband, the policy shall become the property of the person who has paid the premiums, unless otherwise provided in such policy;" and this extract from the statute was printed upon the policy, and attention directed thereto.

The American Life Insurance & Trust Company of Philadelphia had also issued a policy in the sum of \$5,000 on the life of Hume, payable to himself or his personal representatives, and this was collected by his administrators.

Thomas L. Hume died at Washington on the 23d of October, 1881, insolvent, his widow, Annie G. Hume, and six minor children, surviving him.

November 2, 1881, the Central National Bank of Washington, as the holder of certain promissory notes of Thomas L. Hume, amounting to several thousand dollars, filed a bill in the supreme court of the District of Columbia against Mrs. Hume and the Maryland Life Insurance Company, the case being numbered 7,906, alleging that the policy issued by the latter was procured while Hume was insolvent; that Hume paid the premium of \$242.26 without complainant's knowledge or consent, and for the purpose of hindering, delaying, and defrauding the complainant and his other creditors; and praying for a restraining order on the insurance company from paying to, and Mrs. Hume from receiving, either for herself or children, the amount due pending the suit, and "that the amount of the said insurance policy may be decreed to be assets of said Thomas L. Hume applicable to the payment of debts owing by him at his death," etc. The temporary injunction was granted.

On the 12th of November the insurance company filed its answer to the effect that Mrs. Hume obtained the insurance in her own name, and was entitled under the policy to the amount thereof, and setting up and relying upon the seventeenth section of its charter, quoted above. Mrs. Hume answered, November 16th, declaring that she applied for and procured the policy in question, and that it was not procured with fraudulent intent; that the estate of her father, A. H. Pickrell, who died in 1879, was the largest creditor of Hume's estate; that she is her father's residuary legatee; that the amount of the policy was intended, not only to provide for her, but also to secure her against loss.

Benjamin U. Keyser, receiver, holding unpaid notes of Hume, was allowed, by order of court, November 16, 1881, to intervene as co-complainant in the cause.

R. Ross Perry and Reginald Fendall were appointed, November 26, 1881, Hume's administrators. On January 23, 1882, the administrators filed three bills (and obtained injunctions) against Mrs. Hume and each of the other insurance companies, being cases numbered 8,011, 8,012, and 8,013, attacking each of the policies (except the American) as a fraudulent transfer by an insolvent of assets belonging to his creditors.

The answers of Mrs. Hume were substantially the same, *mutatis mutandis*, as above given, and so were the answers of the Connecticut Mutual and the Virginia Life; the former pleading the statute of Connecticut as part of its policy, and the latter the seventh section

of its charter. The Hartford Life & Annuity Company did not answer, and the bill to which it was a party defendant was taken pro confesso.

The administrators were, by order of court, January 2, 1883, admitted parties defendant to said first case numbered 7,906, and cases numbered 8,011, 8,012, and 8,013 were consolidated with that case. January 4, 1883, the court entered a decretal order, dissolving the restraining order in original cause numbered 8,012, and directing the Virginia Insurance Company to pay the amount due upon its policy into court, and the clerk of the court to pay the same over to Mrs. Hume, for her own benefit and as guardian of her children (which was done accordingly;) and continuing the injunctions in original causes 8,011, 8,013, and 7,906, but ordering the other insurance companies to pay the amounts due into the registry of the court.

By order of court, January 30, 1883, the Farmers' & Mechanics' National Bank of Georgetown, which had proved up a large claim against Hume's estate, was allowed to intervene in original cause No. 7,906 as a co-complainant; and March 19, 1883, George W. Cochran, a creditor, was by like order allowed to intervene as co-complainant in the consolidated cases.

The supreme court of the District of Columbia, after argument, on the 5th day of January, 1885, decreed that the administrators should recover all sums paid by Thomas L. Hume as premiums on all policies, including those on the Virginia policy from 1874; and that, after deducting said premiums, the residue of the money paid into court (being that received from the Maryland and the Connecticut Mutual) be paid to Mrs. Hume individually, or as guardian for herself and children; and that the Hartford Life & Annuity Company pay over to her the amount due on the certificates issued by it. From this decree the said Central National Bank, Benjamin U. Keyser, the Farmers' & Mechanics' National Bank of Georgetown, George W. Cochran, and the administrators, as well as Mrs. Hume, appealed to this court, and the cause came on to be heard here upon these cross-appeals.

Mr. Chief Justice FULLER, after stating the facts as above, delivered the opinion of the court.* * * *

Mr Hume having been insolvent at the time the insurance was effected, and having paid the premiums himself, it is argued that these policies were within the provisions of 13 Eliz. c. 5, and inure to the benefit of his creditors as equivalent to transfers of property with intent to hinder, delay, and defraud. The object of the statute of Elizabeth was to prevent debtors from dealing with their property in any way to the prejudice of their creditors; but dealing with that which creditors, irrespective of such dealing, could not have touched.

* The statement of facts is abridged from that in the original report and part of the opinion is omitted.

is within neither the letter nor the spirit of the statute. In the view of the law, credit is extended in reliance upon the evidence of the ability of the debtor to pay, and in confidence that his possessions will not be diminished to the prejudice of those who trust him. This reliance is disappointed, and this confidence abused, if he divests himself of his property by giving it away after he has obtained credit. And where a person has taken out policies of insurance upon his life for the benefit of his estate, it has been frequently held that, as against creditors, his assignment, when insolvent, of such policies, to or for the benefit of wife and children, or either, constitutes a fraudulent transfer of assets within the statute; and this, even though the debtor may have had no deliberate intention of depriving his creditors of a fund to which they were entitled, because his act has in point of fact withdrawn such a fund from them, and dealt with it by way of bounty. *Freeman v. Pope*, L. R. 9 Eq. 206, L. R. 5 Ch. 538.

The rule stands upon precisely the same ground as any other disposition of his property by the debtor. The defect of the disposition is that it removes the property of the debtor out of the reach of his creditors. *Cornish v. Clark*, L. R. 14 Eq. 189. But the rule applies only to that which the debtor could have made available for payment of his debts. For instance, the exercise of a general power of appointment might be fraudulent and void under the statute, but not the exercise of a limited or exclusive power; because, in the latter case, the debtor never had any interest in the property himself which could have been available to a creditor, or by which he could have obtained credit. *May*, *Fraud. Conv.* 33. It is true that creditors can obtain relief in respect to a fraudulent conveyance where the grantor cannot, but that relief only restores the subjection of the debtor's property to the payment of his indebtedness as it existed prior to the conveyance. * * *

We think it cannot be doubted that in the instance of contracts of insurance with a wife or children, or both, upon their insurable interest in the life of the husband or father, the latter, while they are living, can exercise no power of disposition over the same without their consent, nor has he any interest therein of which he can avail himself, nor upon his death have his personal representatives or his creditors any interest in the proceeds of such contracts, which belong to the beneficiaries, to whom they are payable. It is indeed the general rule that a policy, and the money to become due under it, belong, the moment it is issued, to the person or persons named in it as the beneficiary or beneficiaries; and that there is no power in the person procuring the insurance, by any act of his, by deed or by will, to transfer to any other person the interest of the person named. *Bliss*, *Ins.* (2d Ed.) 517; *Glanz v. Gloeckler*, 10 Ill. App. 486, per *McAllister*, J.; *Id.*, 104 Ill. 573, 44 Am. Rep. 94; *Wilburn v. Wilburn*, 83 Ind. 55; *Ricker v. Insurance Co.*, 27 Minn. 193, 6 N. W. 771, 38 Am. Rep. 289; *Insurance Co. v. Brant*, 47 Mo. 419, 4 Am. Rep. 328; *Gould v. Em-*

erson, 99 Mass. 154, 96 Am. Dec. 720; Insurance Co. v. Weitz, 99 Mass. 157.

This must ordinarily be so where the contract is directly with the beneficiary; in respect to policies running to the person insured, but payable to another having a direct pecuniary interest in the life insured; and where the proceeds are made to inure by positive statutory provisions. Mrs. Hume was confessedly a contracting party to the Maryland policy; and, as to the Connecticut contracts, the statute of the state where they were made and to be performed explicitly provided that a policy for the benefit of a married woman shall inure to her separate use or that of her children; but, if the annual premium exceed \$300, the amount of such excess shall inure to the benefit of the creditors of the person paying the premiums.

The rights and benefits given by the laws of Connecticut in this regard are as much part of these contracts as if incorporated therein, not only because they are to be taken as if entered into there, but because there was the place of performance, and the stipulation of the parties was made with reference to the laws of that place. And if this be so as between Hume and the Connecticut companies, then he could not have at any time disposed of these policies without the consent of the beneficiary; nor is there anything to the contrary in the statutes or general public policy of the District of Columbia. It may very well be that a transfer by an insolvent of a Connecticut policy, payable to himself or his personal representatives, would be held invalid in that district, even though valid under the laws of Connecticut, if the laws of the district were opposed to the latter, because the positive laws of the domicile and the forum must prevail; but there is no such conflict of laws in this case, in respect to the power of disposition by a person procuring insurance payable to another.

The obvious distinction between the transfer of a policy taken out by a person upon his insurable interest in his own life, and payable to himself or his legal representatives, and the obtaining of a policy by a person upon the insurable interest of his wife and children, and payable to them, has been repeatedly recognized by the courts. * * *

Conceding, then, in the case in hand, that Hume paid the premiums out of his own money, when insolvent, yet, as Mrs. Hume and the children survived him, and the contracts covered their insurable interest, it is difficult to see upon what ground the creditors, or the administrators as representing them, can take away from these dependent ones that which was expressly secured to them in the event of the death of their natural supporter. The interest insured was neither the debtor's nor his creditors'. The contracts were not payable to the debtor, or his representatives, or his creditors. No fraud on the part of the wife, or the children, or the insurance company is pretended. In no sense was there any gift or transfer of the debtor's property, unless the amounts paid as premiums are to be held to constitute such gift or transfer. This seems to have been the view of the court be-

low, for the decree awarded to the complainants the premiums paid to the Virginia Company from 1874 to 1881, inclusive, and to the other companies from the date of the respective policies; amounting, with interest, to January 4, 1883, to the sum of \$2,696.10, which sum was directed to be paid to Hume's administrators out of the money which had been paid into court by the Maryland and Connecticut Mutual Companies. But, even though Hume paid this money out of his own funds when insolvent, and if such payment were within the statute of Elizabeth, this would not give the creditors any interest in the proceeds of the policies, which belonged to the beneficiaries for the reasons already stated.

Were the creditors, then, entitled to recover the premiums? These premiums were paid by Hume to the insurance companies, and to recover from them would require proof that the latter participated in the alleged fraudulent intent, which is not claimed. Cases might be imagined of the payment of large premiums, out of all reasonable proportion to the known or reputed financial condition of the person paying, and under circumstances of grave suspicion, which might justify the inference of fraud on creditors in the withdrawal of such an amount from the debtor's resources; but no element of that sort exists here.

The premiums form no part of the proceeds of the policies, and cannot be deducted therefrom on that ground. Mrs. Hume is not shown to have known of or suspected her husband's insolvency, and if the payments were made at her instance, or with her knowledge and assent, or if, without her knowledge, she afterwards ratified the act, and claimed the benefit, as she might rightfully do (*Thompson v. Ins. Co.*, 46 N. Y. 675), and as she does (and the same remarks apply to the children), then has she thereby received money which *ex æquo et bono* she ought to return to her husband's creditors; and can the decree against her be sustained on that ground? If in some cases payments of premiums might be treated as gifts inhibited by the statute of Elizabeth, can they be so treated here?

It is assumed by complainants that the money paid was derived from Hume himself, and it is therefore argued that to that extent his means for payment of debts were impaired. That the payments contributed in any appreciable way to Hume's insolvency, is not contended. So far as premiums were paid in 1880 and 1881 (the payments prior to those years having been the annual sum of \$196.18 on the Virginia policy), we are satisfied from the evidence that Hume received from Mrs. Pickrell, his wife's mother, for the benefit of Mrs. Hume and her family, an amount of money largely in excess of these payments, after deducting what was returned to Mrs. Pickrell; and that, in paying the premiums upon procuring the policies in the Maryland and the Connecticut Mutual, Hume was appropriating to that purpose a part of the money which he considered he thus held in trust; and we think

that, as between Hume's creditors and Mrs. Hume, the money placed in Hume's hands for his wife's benefit is, under the evidence, equitably as much to be accounted for to her by Hume, and so by them, as is the money paid on her account to be accounted for by her to him or them.

We do not, however, dwell particularly upon this, nor pause to discuss the bearing of the laws of the states of the insurance companies upon this matter of the payment of premiums by the debtor himself, so far as they may differ from the rule which may prevail in the District of Columbia, in the absence of specific statutory enactment upon that subject, because we prefer to place our decision upon broader grounds.

In all purely voluntary conveyances it is the fraudulent intent of the donor which vitiates. If actually insolvent, he is held to knowledge of his condition; and if the necessary consequence of his act is to hinder, delay, or defraud his creditors, within the statute, the presumption of the fraudulent intent is irrebuttable and conclusive, and inquiry into his motives is inadmissible. But the circumstances of each particular case should be considered. * * * In considering the sufficiency of the debtor's property for the payment of debts, the probable, immediate, unavoidable, and reasonable demands for the support of the family of the donor should be taken into the account and deducted, having in mind also the nature of his business and his necessary expenses. *Emerson v. Bemis*, 69 Ill. 541.

This argument in the interest of creditors concedes that the debtor may rightfully preserve his family from suffering and want. It seems to us that the same public policy which justifies this, and recognizes the support of wife and children as a positive obligation in law as well as morals, should be extended to protect them from destitution after the debtor's death, by permitting him, not to accumulate a fund as a permanent provision, but to devote a moderate portion of his earnings to keep on foot a security for support already, or which could thereby be, lawfully obtained, at least to the extent of requiring that, under such circumstances, the fraudulent intent of both parties to the transaction should be made out. And inasmuch as there is no evidence from which such intent on the part of Mrs. Hume or the insurance companies could be inferred, in our judgment none of these premiums can be recovered.

The decree is affirmed, except so far as it directs the payment to the administrators of the premiums in question and interest, and, as to that, is reversed, and the cause remanded to the court below, with directions to proceed in conformity with this opinion. Ordered accordingly.

IV. The Rights of the Assignee ¹⁰

MORRIS v. GEORGIA LOAN, SAVINGS & BANKING CO.

(Supreme Court of Georgia, 1899. 109 Ga. 12, 34 S. E. 378, 46 L. R. A. 506.)

Action by L. S. Morris, administrator, against the Georgia Loan, Savings & Banking Company and others. Judgment for defendants, and plaintiff brings error.

LITTLE, J.¹¹ Morris, as administrator of Ragland, instituted an action against Cassin, Purtell, and the Georgia Loan, Savings & Banking Company, a corporation doing business in the city of Atlanta, to recover the sum of \$4,556.31, with interest, which he claims the defendants to be due to him under the following alleged facts: In May, 1895, Ragland procured from the Connecticut Mutual Life Insurance Company a policy of insurance upon his own life for the sum of \$5,000, on which the annual premium was \$103.15. The premiums were payable quarterly, and Ragland paid such premiums as were due on May 27 and August 27, 1895. Being unable to continue the payment of the premiums, Cassin and Purtell agreed to advance to him the amounts necessary to pay the same as they became due, and, to secure payment of the amount so advanced, Ragland assigned the policy to Cassin and Purtell, who required and received of Ragland his promissory note, dated December 11, 1895, for \$4,300 principal, to become due one year after date. This pretended debt was fictitious, except as to the premiums advanced by Cassin and Purtell. At the time of these transactions, Cassin was the cashier of the defendant banking company. After the execution of the note, Cassin and Purtell indorsed it in blank, and made a pretended transfer of it to the defendant the banking company, which took the same with notice of its character. On November 5, 1896, Cassin and Purtell also transferred the policy of insurance to the banking company. A short time thereafter Ragland died. Cassin, as cashier of the banking company, made out and forwarded proofs of death, and on the 31st day of December, 1896, the insurance company paid to the banking company the face value of the policy (\$5,000), which was consented to by the plaintiff in error under notice that he, as administrator, would claim from the banking company the amount so paid, less what had been advanced to Ragland by Cassin and Purtell. Of the \$5,000 the banking company retained \$4,663.11, and \$309.89 was received by Ragland's administrator. By the terms of the policy, the amount insured was payable to the representatives of

¹⁰ For discussion of principles, see Vance on Insurance, §§ 143-145. See, also, Cooley, Briefs on the Law of Insurance, vol. 4, p. 3802 et seq.

¹¹ Part of the opinion is omitted.

Ragland, and the only claim that Cassin and Purtell and the banking company have on the fund is the amount of one premium, \$106. No services were rendered, accepted, or contracted for from Cassin, Purtell, or the banking company. * * *

It is insisted on the part of the plaintiff in error that there was evidence before the court which would have authorized the jury to have found that, having made a valid contract of insurance on his life, payable to his executors, administrators, and assigns, Ragland was induced by the two defendants, Cassin and Purtell, to transfer and assign the policy to them for a consideration of \$25 or \$30 in addition to the payment of certain subsequent premiums as they fell due, and that the note of \$4,300 delivered by Ragland to the assignees was really without any consideration, and made as a cover to conceal the nakedness of the transfer. An examination of the evidence contained in the record shows that the policy was issued to Ragland on May 27, 1895, and that the assignment of the policy to Cassin and Purtell was made on December 11, 1895, more than six months thereafter. It does not appear that Cassin paid any premiums until May subsequent to the assignment, and, for aught that appears in the record, the policy evidences a good and valid contract insuring the life of Ragland. If it be true that there was no consideration for the note of \$4,300, and that the same was executed and delivered by Ragland only for the purpose of enabling the assignees to claim the entire amount of the policy, it must fail to accomplish that result; for, as a matter of law, an assignment of a policy of life insurance to a creditor by the insured, and for the purpose of securing his indebtedness, is valid only in the amount of the debt and the expense incurred by the creditor in keeping up the policy. In 2 May, Ins. § 459a, it is said: "A creditor's claim upon the proceeds of insurance intended to secure the debt should go no further than indemnity, and all beyond the debt, premiums, and expenses should go to the debtor and his representatives, or remain with the company, according as the insurance is upon life or on property." And in 13 Am. & Eng. Enc. Law (1st Ed.) p. 648, it is declared, on the authority of adjudicated cases cited, that, "where the assignment is for the purpose of securing a creditor, although he is entitled to recover the face of the policy, he cannot hold what is not necessary for his indemnity. The legal representatives of the debtor will be entitled to the balance."

A case which seems directly in point is that of *Cammack v. Lewis*, 15 Wall. 643, where it appeared that L. was indebted to C. in the sum of \$70, and, at C.'s suggestion, L. took out a policy on his life for \$3,000, for which C. paid the premium. Immediately after the policy was issued L. gave to C. a note for \$3,000, and assigned to him the policy of insurance. A short time thereafter L. died, and the widow filed a bill to recover the amount of the policy, or, rather, such a part of it as she had not theretofore received. In delivering the opinion of the court, Mr. Justice Miller said: "We think that Cammack could,

in equity and good conscience, only hold the policy as security for what Lewis owed him when it was assigned and such advances as he might afterwards make on account of it, and that the assignment of the policy to him was only valid to that extent." See, also, the case of *Bank v. Loh*, 104 Ga. 446, 31 S. E. 459, 44 L. R. A. 372, where this court held that a creditor has, for the purpose of indemnifying himself against loss and for no other, an insurable interest in the life of his debtor, and that the insurance will be available to the creditor to no greater extent than the amount of his insurable interest at the time the insurance was effected, viz. the amount of the then existing indebtedness. So that if it be true that, at the time he executed and delivered the promissory note for \$4,300 and assigned the policy of insurance to Cassin and Purtell, Ragland was in fact a debtor to the assignees in an amount less than the face of the policy, the effect of the assignment was to vest in the assignees title to so much of the fund collected as equaled the amount of the true indebtedness. The original contract of insurance made the executors and administrators of Ragland, as well as his assigns, the payees of the policy, and after payment of the debt his assignment secured the administrator would in law be entitled to have the balance.

But it is urged that, even if the note was without consideration, the inference is legally irresistible that the purpose of the parties in the execution of the note and the assignment of the policy of insurance was an accommodation. How this is we, of course, do not know. Only a jury, under proper instructions, should determine that fact. * * * Reversed.¹²

V. Rights of Mortgagor and Mortgagee¹³

HOME INS. CO. v. MARSHALL.

(Supreme Court of Kansas, 1892. 48 Kan. 235, 29 Pac. 161.)

Commissioners' decision.

Action by the Home Insurance Company against D. W. Marshall and wife to foreclose a mortgage. From a judgment in its favor for only \$103 plaintiff brings error.

GREEN, C.¹⁴ The plaintiff in error brought an action to foreclose a mortgage executed by D. W. Marshall and wife to the Equitable

¹² See, also, *Nye v. Grand Lodge A. O. U. W.*, ante, p. 19. Rights of assignees of fire policies, see *New v. German Ins. Co.*, ante, p. 15, and *Kase v. Hartford Fire Ins. Co.*, ante, p. 17. See, also, *Quarles v. Clayton*, ante, p. 10.

¹³ For discussion of principles, see *Vance on Insurance*, §§ 146, 147. See, also, *Cooley, Briefs on the Law of Insurance*, vol. 4, p. 3699 et seq.

¹⁴ Part of the opinion is omitted.

Trust & Investment Company to secure the payment of eight hundred dollars, dated February 1, 1886, due in five years. The notes and mortgage were assigned by the payee to the Massachusetts Mutual Life Insurance Company, and on December 27, 1887, assigned to the Home Insurance Company, the plaintiff below. The defendants below admitted the execution of the notes and mortgage, but alleged payment by the collection of an insurance policy of \$800, which they were required by the mortgage to take out upon the building situated upon the mortgaged premises, which building they alleged had been destroyed by fire on the 13th of June, 1887; that the plaintiff in error, after it had received notice of the loss, sent an adjuster to inspect the same, and, for the purpose of defrauding the defendant in error out of the insurance, took an assignment of the notes and mortgage sued upon, including the policy of insurance. A jury was waived, and the court found, in substance, that the material allegations of the petition were true; that the sum of \$800 and interest was due from the defendants upon the mortgage.

The court then made the following findings in relation to the set-off claimed by the defendants: "The court finds that the plaintiff issued to the defendant Daniel W. Marshall a policy of insurance on the dwelling-house situated on the mortgaged property for \$800, for the term of five years, payable to the Equitable Trust & Investment Company, mortgagee and assignor of the mortgage to the Massachusetts Mutual Life Insurance Company, and by said company assigned to plaintiff; that in June, 1887, the insured property was burned, and totally lost, of which the plaintiff was notified, and by its agent and adjuster made an examination, and inspected the affair, and afterwards paid to the Massachusetts Mutual Life Insurance Company the amount of the policy, and took an assignment of the mortgage and of the insurance policy; that the plaintiff never adjusted this loss by fire with the defendant Daniel W. Marshall, and on the 7th day of September, 1888, commenced this suit to foreclose the mortgage." The court found that the defendants were entitled to such a set-off as reduced the claim of the plaintiff to \$103, and gave judgment in favor of the plaintiff for such amount.

It is first contended that there is no finding by the court that the plaintiff was ever indebted to the defendants upon the insurance policy, or that the policy found to have been issued was valid or in force at the time of the fire, or that any of the conditions of the policy which were necessary to make it the basis for a claim against the plaintiff were complied with by the insured. Was such finding necessary to fix the liability of the insurance company for the amount of the policy? The court did find that the property insured was destroyed by fire in June, 1887, and that there was a total loss of the property described in the policy; that the company had notice of such loss, and inspected the same. The court also found that it paid to the Massachusetts Mutual Life Insurance Company the amount of the policy, and took an

assignment of the mortgage and the insurance policy. How are we to regard this finding of the court? Is it not to be taken as a recognition of the policy by the insurer? Why should the insurance company pay the amount of the policy to the holder of the mortgage and policy unless the latter was valid? The rule has been stated in *Wood on Fire Insurance* (volume 2, § 452): "In all cases where a party has an election, he will be bound by the course he first adopts, with full knowledge of all the facts; and any act that indicates that an election has been made, and that in any respect affects the rights of the other party, estops him from afterwards doing anything inconsistent with such election. Therefore, where an insurance company is in a position where it may be liable upon a policy or not, at its election, whenever it does an act that indicates that it has elected to treat the policy as the basis of a legal claim against it, it cannot afterwards recede, if anything has been done of a decisive character indicating its election."

We think the finding of the court that the insurance company paid to the holder of its policy the amount named therein, clearly established the fact that it recognized the policy as a valid and subsisting obligation. The insurance company had no right to the full amount due upon the mortgage, after recognizing the validity of the policy. The insurance was collateral to the debt, and the amount paid upon the policy should have been applied as a payment upon the debt secured by the mortgage. Equity and fair dealing between the parties to this contract of insurance require that the insurer should be required to make such application, in accordance with the finding of the court.

The plaintiff in error contends that the special findings of the court are not based upon the allegations of the answer, and are therefore not sustained by the pleadings. The answer alleged, among other things, that the debt secured by the notes and mortgage sued upon had been paid. It then stated what had been done by the plaintiff in reference to the loss and the payment of the amount of the policy to the holder of the mortgage and policy. In a case not unlike this, in some respects, it was decided by this court that, where the jury had found that the mortgagee had received from the insurer and other companies a sum sufficient to pay off the bond and mortgage, it authorized the legal conclusion that the payment was in satisfaction of the note and mortgage, and not for the purposes of assignment. "In other words, the insurance company had obligated itself to pay the loss to the mortgagee. It did so, but, instead of discharging the mortgage, it took an assignment of it and sought to enforce it. There can be no doubt but that the legal conclusion irresistibly follows the findings of the jury." *Insurance Co. v. Smelker*, 38 Kan. 288, 16 Pac. 735. The legal conclusion of the court was that the payment of the policy by the company was pro tanto to be applied in satisfaction of the note and mortgage, and was not made for the purpose of an as-

signment. Under this view of the findings they are clearly in accordance with the allegations of the answer. * * * It is recommended that the judgment be affirmed.

PER CURIAM. It is so ordered; all the justices concurring.¹⁵

VI. Subrogation¹⁶

DILLING v. DRAEMEL.

(Common Pleas of New York City and County, General Term, 1890. 9 N. Y. Supp. 497.)

Action by Karl Dilling against William Draemel, to recover on a certificate of fire insurance. Plaintiff recovered a judgment, from which defendant appeals.

LARREMORE, C. J. The plaintiff held a certificate as a member of a voluntary association, insuring his furniture and household goods against loss "either immediate, through fire, explosion, or collapse of building, or mediate, through water in extinguishing fire." Subsequently the easterly wall of the house he occupied fell, in consequence of an excavation made upon the adjoining lot. Plaintiff in the first instance claimed that his landlord was liable to him in tort as a wrong-doer by reason of the falling of the wall, and brought an action against him to recover damages for the loss, among other things, to his goods, merchandise, and other property. That action was settled in consideration of \$300, paid by his landlord to the plaintiff, whereupon he executed and delivered to the latter a general release under seal against all claims, dues, and demands whatsoever. Thereafter he brought this action to recover that proportion of his loss over the amount of \$300, claiming that he had a discretion at his own pleasure to apportion such loss. He recovered a judgment, from which this appeal is taken.

The case was decided in the court below upon the theory that the plaintiff had not received all the damages sustained by him from the wrong-doer, and that, although he had absolutely released the wrong-doer such action might be maintained. It is well settled that, if a loss under a policy of insurance is occasioned by the wrongful act of a third party, the insurer occupies the position of a mere surety, and the wrong-doer that of a principal debtor; and all the incidents of suretyship attach to the position of the underwriter in such a case,

¹⁵ See, also, *Kase v. Hartford Fire Ins. Co.*, ante, p. 17.

¹⁶ For discussion of principles, see *Vance on Insurance*, §§ 149, 150. See also, *Cooley, Briefs on the Law of Insurance*, vol. 4, p. 3892 et seq.

including the right of subrogation. *Hall v. Railroad Cos.*, 13 Wall. 367, 373, 20 L. Ed. 594.

The same principle is applicable to a contract of insurance, if the surety destroys the remedy of subrogation, and relieves the assurer to the full extent to which the wrong-doer could have been made liable for the loss. *Sheld. Subr.* § 222; *Insurance Co. v. Storrow*, 5 Paige (N. Y.) 285. Both parties rely on the case of *Connecticut Fire Ins. Co. v. Erie R. Co.*, 73 N. Y. 399, 29 Am. Rep. 171. A careful examination of that case shows that it is an authority against the ruling of the court below. That action was brought by an underwriter to recover from the Erie Railroad Company, under the right of subrogation, the amount paid by the underwriter to the assured. A release was given by the assured to the company, which was not absolute in terms, as is the release in this case. The release in the case contained a statement that the settlement did not include any claim the assured had against the underwriter, and the court held that, because of that reservation, the right of subrogation of the underwriter was preserved as against the railroad company, and that the release was limited, and by its terms preserved the rights of the insured to collect what the insurance company owed him.

The release in this case is a general release without any such reservation, and the \$300 paid cannot be considered as a payment pro tanto for the loss. Such a release destroyed the right of subrogation. If the assured, by his own act, absolutely and without reservation releases the wrong-doer, he thereby discharges the insurer to the full extent to which he has defeated the insurer's remedy over by right of subrogation. *Insurance Co. v. Storrow*, supra; *Carstairs v. Insurance Co. (C. C.)* 18 Fed. 473. The judgment appealed from should be reversed, with costs.

CHICKASAW COUNTY FARMERS' MUT. FIRE INS. CO. v. WELLER.

(Supreme Court of Iowa, 1896. 98 Iowa, 731, 68 N. W. 443.)

Action by the Chickasaw County Farmers' Mutual Fire Insurance Company to recover \$110, with interest, alleged to have been fraudulently obtained by the defendant from the plaintiff. Judgment for the plaintiff. Defendant appeals.

GIVEN, J.¹⁷ 1. The learned district judge made the following findings of fact and of law, and we think the findings of facts are fully sustained by the evidence:

"After the evidence and arguments of counsel were concluded, the following findings of fact and law were made by the court, to-wit: That plaintiff, the Chickasaw County Farmers' Mutual Fire Insur-

¹⁷ The statement of facts is rewritten and part of the opinion is omitted.

ance Company, a corporation duly organized under the laws of Iowa, issued to the defendant an insurance policy in the year 1875, which policy has remained in full force from the time it was issued down to the date of the commencement of this action; that on or about the 10th day of September, 1893, some stacks of hay covered by the insurance company with the insurance policy thus issued to the defendant were burned, and the defendant sustained a loss thereby, for which the plaintiff was liable under this policy; that both the plaintiff and the defendant claim, and have claimed in attempting to adjust the loss, that the loss was occasioned through the negligence of the Chicago Great Western Railway Company, and that the Chicago Great Western Railway Company was ultimately liable for the payment of the loss; that on or about the 19th day of March, 1894, the defendant, having made a claim against the said railway company for the loss of the hay in question, made a settlement with that company, and on the 24th day of March, 1894, received full payment of said railway company for the loss thus sustained; that on the same day that the settlement was made with the railway company the defendant notified the plaintiff that he was ready to receive and receipt for \$110 from that company in payment of the same loss, this being the amount that had been agreed upon between him and the insurance company as the amount to be paid by the company for the loss; that the defendant, in thus notifying the plaintiff, did not notify the plaintiff that he had made a settlement of the same claim with the railway company, and that the insurance company or its officers had no notice that the railway company had thus settled and paid the loss to the defendant; that on the 12th day of April, 1894, and without any knowledge or notice that the loss had been adjusted by the railway company with the defendant, the plaintiff paid the defendant said sum of \$110, and took his receipt therefor; that the plaintiff in this action claimed during all the negotiations for settlement, and the defendant knew that the plaintiff claimed, that if it paid the loss to him under the policy issued to him it was the insurance company's right to recover back the amount thus paid, if it could, from the railway company.

"As a conclusion based on these facts, I find that the settlement made by the railway company with the defendant extinguished his claim, both as against the railway company and the insurance company, and in receiving money from the insurance company after having received it from the railway company, and without giving the insurance company notice of the fact that he had thus received the money, he received the money wrongfully, and is liable to refund the money to the company, and that the plaintiff is entitled to judgment against him for it in this action; and judgment will be entered accordingly, with interest at 6 per cent. from the 11th day of April."

2. There is no question in this case but that the defendant was entitled to full compensation from the railway company for the loss

sustained by him in consequence of the fire set out by that company. Neither is it questioned but that he was entitled to full indemnity under his contract of insurance, not exceeding the amount of the insurance, from the plaintiff. One contention is whether he was entitled to full compensation from the railway company, and also from the plaintiff. This contract of insurance is a contract of indemnity, by which the plaintiff agreed to indemnify the defendant against loss or damages to the insured property by fire or lightning, not exceeding the amount of the insurance. The law is well settled that in cases like this the insurer, upon payment of the loss, is subrogated to all the rights of the insured against the person whose fault or negligence caused the loss. "If insured buildings or other property be destroyed through the negligence of some person other than the owner, the insurance company, upon the payment of the loss, will be subrogated to the right of the owner to recover from the wrongdoer. The insured cannot bar the insurer's right of action by executing a release of damages to the wrongdoer, though he may release the wrongdoer from all claim for injuries not covered by the policy without impairing his rights against the underwriter. If he obtain satisfaction from the wrongdoer, having previously received payment of the loss from the insurer, he must account therefor to the latter." 24 Am. & Eng. Enc. Law, 306, 308-310, and cases cited. Under these recognized principles of law, it is clear that upon payment of the loss the plaintiff would have been subrogated to all the rights of the defendant against the railway company, and that the defendant could not defeat that right of subrogation by releasing the railway company.

Appellant instances the case of one who has insurance upon his life, and is killed by the negligence of the employes of a railway company, and contends that because the estate has a claim for damages against the railroad company it does not excuse the insurance company from liability. He cites 24 Am. & Eng. Enc. Law, 319. It is there said, "A contract of life insurance is not a contract of indemnity, and the insurer who pays a loss under such a contract is not entitled to be subrogated to any rights which the personal representative of the deceased may have against other persons." The same is true as to the other instance given by appellant, of one who purchased a horse with the special warranty that it is not timid, and will not shy in crossing bridges, and afterwards the horse does shy, and falls from a bridge, and is drowned, for want of sufficient guards on the bridge. In such case the contract of warranty is not one of indemnity merely. We think it entirely clear, under the law, that defendant was not entitled to recover for the loss of hay in stack from both of these parties.

3. Defendant was entitled to full compensation for the loss sustained. His claim against the railway company was for damages to his meadow and fence posts, in addition to the loss of the hay; and he contends that he only received part compensation from the railway

company, and that the amounts received from both companies do not exceed the actual loss. In his settlement with the railway company the hay was estimated separately, and the defendant was compensated to the full value thereof.

Defendant contends that the plaintiff knew he was claiming payment from the railway company, and that the payment made by the plaintiff to him was a voluntary payment, and cannot be recovered back. Let it be conceded that the plaintiff did know that the defendant was making a claim against the railway company. It is entirely clear that at the time of demanding and receiving payment from the plaintiff the defendant concealed the fact that he had made a settlement with the railway company, and had received payment from that company. "When one pays money in ignorance of circumstances with which the receiver is acquainted, but does not disclose, and which, if disclosed, would have avoided the payment, the receiver acts fraudulently, and the money may be recovered back." 8 Am. & Eng. Enc. Law, 645. There can be no doubt that had the facts been disclosed by the defendant, as it was his duty to do, the plaintiff would not have made this payment. Therefore it was not a voluntary payment, but one obtained by fraud, and may be recovered back. * * *

We find no error prejudicial to appellant, and the judgment of the district court is therefore affirmed.

NORWICH UNION FIRE INS. SOC. v. STANDARD OIL CO.

(Circuit Court of Appeals of United States, Eighth Circuit, 1894. 50 Fed. 984, 8 C. C. A. 433.)

In Error to the Circuit Court of the United States for the District of Kansas.

This was an action by the Norwich Union Fire Insurance Society, of Norwich, England, against the Standard Oil Company and the Goodlander Mill Company, to recover the amount of certain insurance paid by the plaintiff to the defendant mill company, upon the ground that the property was burned through the culpable negligence of the defendant oil company. A demurrer to the complaint was sustained.

It is alleged in the petition that in the year 1887 the Norwich Fire Insurance Society issued a policy of insurance, in the sum of \$3,000, to the Goodlander Mill Company,—a corporation organized under the laws of Kansas, and doing business at Ft. Scott; that the insurance was upon certain wheat owned by the mill company. The petition further shows that the German Fire Insurance Company had also issued a policy of insurance in the same amount—\$3,000—to the mill company, upon wheat. The last-mentioned policy having been assigned to the plaintiff in this case, plaintiff brings this suit to recover the amount of both policies,—\$6,000. The petition further shows that

after the issuance of the policies of insurance the wheat was destroyed by fire, and that these insurance companies paid the loss in the amount of their respective policies, \$3,000 each, and took an assignment in writing of whatever claim the mill company might have against the defendant because of the loss to the amount of their policies. It is further alleged that the fire occurred by reason of the negligence of the defendant the Standard Oil Company. The facts stated in the petition are to the effect that the defendant shipped a tank car of petroleum from Lima, Ohio, consigned to the gas company at Ft. Scott, which car was placed upon a side track near the mill and elevator of the Goodlander Mill Company, and that the employes of the gas company attempted to unload the car, but, because of the defective construction of the car, the oil escaped, took fire, and the mill and its contents were destroyed. It appears upon the face of the petition that the wheat destroyed by fire was of the value of \$20,000, and that there were other policies of insurance upon the wheat, in addition to those upon which this suit is based. The written assignment given by the Goodlander Mill Company to the plaintiff and to the German Fire Insurance Company fixes the value of the wheat destroyed at \$40,000. While this assignment is not in the body of the petition, a copy of it is attached to, and made a part of, the petition. Hence, it is clearly shown by the petition that the amount here sued for is but a small part of the loss actually sustained by the Goodlander Mill Company in the destruction of its property by the fire alleged to have been caused by the defendant's negligence.¹⁸

Before CALDWELL and SANBORN, Circuit Judges, and THAYER, District Judge.

CALDWELL, Circuit Judge, delivered the opinion of the court.

The circuit court sustained the demurrer to the complaint on the ground that the plaintiff could not maintain the action in its own name, and the correctness of this ruling is the only question we find it necessary to consider.

When an insurance company pays to the assured the amount of a loss of the property insured, it is subrogated, in a corresponding amount, to the assured's right of action against any other person responsible for the loss. This right of the insurer against such other person is derived from the assured alone, and can be enforced in his right only. At common law it must be asserted in the name of the assured. In a court of equity or of admiralty, or under the modern codes of practice, it may be asserted by the insurance company in its own name, when it has paid the insured the full value of the property destroyed. *St. Louis, I. M. & S. Ry. Co. v. Commercial Union Ins. Co.*, 139 U. S. 223, 235, 11 Sup. Ct. 554, 35 L. Ed. 154, and cases cited; *Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co.* (C. C.) 41 Fed. 643. But the rule seems to be well settled that, when the value

¹⁸ The statement of facts is abridged from the original report.

of the property exceeds the insurance money paid, the suit must be brought in the name of the assured. *Ætna Ins. Co. v. Hannibal & St. J. R. Co.*, 3 Dill. 1, Fed. Cas. No. 96; *Assurance Co. v. Sainsbury*, 3 Doug. 245; *Insurance Co. v. Boshier*, 39 Me. 253, 63 Am. Dec. 618; *Hart v. Railroad Corp.*, 13 Metc. (Mass.) 99, 46 Am. Dec. 719; *Connecticut, etc., Ins. Co. v. New York, etc., R. Co.*, 25 Conn. 265, 278, 65 Am. Dec. 571; *Insurance Co. v. Frost*, 37 Ill. 333; *Fland. Ins. pp.* 360, 481, 591; *Marine Ins. Co. v. St. Louis, I. M. & S. Ry. Co.*, supra. In such an action the assured may recover the full value of the property from the wrongdoer, but as to the amount paid him by the insurance company, he becomes a trustee; and the defendant will not be permitted to plead a release of the cause of action from the assured, or to set up as a defense the insurance company's payment of its part of the loss. *Hart v. Railroad Corp.*, supra; *Hall v. Railroad Co.*, 13 Wall. 367, 20 L. Ed. 594. In support of this rule it is commonly said that the wrongful act is single and indivisible and can give rise to but one liability. "If," says Judge Dillon in *Ætna Ins. Co. v. Hannibal & St. J. R. Co.*, supra, "one insurer may sue, then, if there are a dozen, each may sue; and, if the aggregate amount of all the policies falls short of the actual loss, the owner could sue for the balance. This is not permitted, and so it was held nearly a hundred years ago, in a case whose authority has been recognized ever since both in Great Britain and in this country."

The learned counsel for the plaintiff in error challenges the soundness of this rule, and contends with much force that the rule that a wrongdoer who injures many people by the same act is liable to each person separately for the injury done to each should be applied to this class of cases. It is said, "The convenience of the innocent injured man to sue and get reparation is paramount to the inconvenience of the wrongdoer who suffers from a multiplicity of suitors." It would serve no useful purpose to repeat here the reasoning of the courts in answer to this contention. The subject is fully gone over in the authorities we have cited.

The rule that, where the property exceeds in value the amount insured, the suit must be in the name of the assured, seems not to rest so much upon the necessity or desirability of exempting the wrongdoer from a multiplicity of suits as upon the peculiar nature of the relation existing between the assured and the insurer. It is held by the supreme judicial court of Massachusetts (*Hart v. Railroad Corp.*, supra) and by the supreme court of the United States (*Hall v. Railroad Co.*, supra) that in respect to the ownership of the property, and the risk incident thereto, the owner and the insurer are considered but one person, having together the beneficial right to the indemnity due from one who is responsible for its loss. When the insurer pays the assured the full value of the property destroyed, the insurer may maintain an action in his own name against one responsible for its loss, because, by operation of law, the whole beneficial right to

indemnity from the wrongdoer has been vested in the insurer. He is therefore the real and only party in interest, and, under the Code, the proper party to bring the suit. But, when the value of the property destroyed exceeds the insurance money paid, the beneficial right to indemnity from the wrongdoer remains in the assured, for the whole value of the property,—for the unpaid balance due to himself, as well as for the amount paid by the insurer, as to which last sum he is chargeable as a trustee.

It will be observed that in this case 10 other insurance companies have issued separate policies on the property, and that the aggregate amount of all the policies only equals three-fourths of the value of the property, and that the assured has brought suit against the oil company for the value of the property destroyed. If the contention of the plaintiff in error is sound, then the 11 insurance companies and the assured can each maintain a separate action against the alleged wrongdoer. We are cited to no case which supports this contention, and we do not think one can be found. The allegation of the complaint that the mill company, in its action against the oil company, makes no claim for the amount of insurance paid by the plaintiff, does not alter the case; for, if this was done at the request of the plaintiff, it cannot complain, and if it was done by the mill company on its own motion, and it recovers in the action, it will hold an amount of the recovery equal to the insurance paid as trustee for the plaintiff.

The judgment of the circuit court is affirmed.¹⁹

¹⁹ Compare *Atchison, T. & S. F. R. Co. v. Home Ins. Co.*, 59 Kan. 432, 53 Pac. 459 (1898).

THE STANDARD FIRE POLICY ¹

I. The General Rule of Construction ²

CLAY v. PHOENIX INS. CO.

(Supreme Court of Georgia, 1895. 97 Ga. 44, 25 S. E. 417.)

Action by C. C. Clay against the Phoenix Insurance Company. From a judgment of nonsuit, plaintiff brings error.

ATKINSON, J.³ * * * Courts are not at liberty to arbitrarily disregard reasonable limitations imposed upon the liability of insurance companies under policies of insurance by stipulations and conditions therein expressed; but in the construction of such policies and such conditions and stipulations the courts will look through the whole contract to the real intention of the parties at the time of the execution of the instrument, and give to it such construction as will impute to them a reasonable intendment, and such construction as will relieve against forfeitures, if that construction be consistent with the general intent expressed in the policy. Courts will presume, when policies of insurance are issued by insurance companies, and they accept premiums paid therefor, that such policies are issued in good faith, and with the design, upon the consideration received, to afford to the assured reasonable immunity in case of loss. If the condition be so repugnant to the stating clause of insurance as that both cannot stand together, courts should disregard the condition, upon the idea that it will not be presumed that the insurance company issues a policy of insurance with an intention never to become liable thereon. If the condition impose upon the assured a duty with respect to the thing insured, that duty must be performed, however slightly material to the interest of the insurer its performance may appear to be. If the condition or stipulation impose duties which are wholly immaterial, or with respect to matters which are wholly irrelevant, the right of the assured would not be affected by a nonperformance.

There is no greater sanctity and no more mystery about a contract

¹ The New York standard form of fire policy has been adopted in New York, Connecticut, Louisiana, Missouri, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, and South Dakota, though there are minor differences in some instances. In Maine, Massachusetts, Minnesota, Michigan, New Hampshire, and Wisconsin standard forms have been adopted differing in some particulars from the New York form. In other states, the New York standard form is generally used.

² For discussion of principles, see Vance on Insurance, §§ 151, 152. See, also, Cooley, Briefs on the Law of Insurance, vol. 1, p. 627 et seq.

³ Part of the opinion is omitted.

of insurance than any other. The same rules of construction apply to it as to other contracts, and the true rule for their interpretation may be stated to be that stipulations and conditions in policies of insurance, like those in all other contracts, are to have a reasonable intendment, and are to be so construed, if possible, as to avoid forfeitures, and to advance the beneficial purposes intended to be accomplished. * * * Reversed.

JOHN DAVIS & CO. v. INSURANCE CO. OF NORTH AMERICA.

(Supreme Court of Michigan, 1897. 115 Mich. 382, 73 N. W. 393.)

Action by John Davis & Co., a corporation, against the Insurance Company of North America, to recover under a policy of insurance issued by defendant, for the value of goods destroyed by fire. From a judgment in favor of plaintiff, but for a less sum than that demanded, both parties bring error.

MONTGOMERY, J.⁴ This is an action on a fire insurance policy. The plaintiff was a dealer in grocers' supplies at 45 Larned street, Detroit, occupying a brick building, and held a policy issued by the defendant, and covering the stock in trade, in the sum of \$2,000. There was \$6,000 concurrent insurance. On the 6th day of November, 1895, a boiler exploded in the basement of an adjoining building, occupied by the Detroit Journal, and both buildings fell in. A fire ensued in No. 47, but none of the goods in No. 45 were actually consumed by fire. There were saved from the wreck goods which in their perfect state were worth \$996. It was shown that goods were damaged by water poured upon them for the purpose of extinguishing fire. * * *

The clauses of the policy under which the questions presented arise are as follows: "This company shall not be liable for loss caused directly or indirectly by invasion, insurrection, riot, civil war, or commotion, or military or usurped power, or by order of any civil authority, or by theft, or by neglect of the insured to use all reasonable means to save and preserve the property at and after a fire, or when the property is endangered by fire in neighboring premises, or (unless fire ensues, and in that event for the damage by fire only) by explosion of any kind, or lightning, but liability for direct damages by lightning may be assumed by specific agreement hereon." "If a building, or any part thereof, fall, except as the result of fire, all insurance by this policy on such building or its contents shall immediately cease."

It is contended by the defendant that the policy terminated immediately upon the fall of the building. It may be conceded that, if the last clause above quoted stood alone, such would be its effect. *Huck v. Insurance Co.*, 127 Mass. 306, 34 Am. Rep. 373. But this

⁴ Part of the opinion is omitted.

clause is preceded by a specific clause which governs in case of explosion. The case is directly ruled by *Dows v. Insurance Co.*, 127 Mass. 346, 34 Am. Rep. 384. The policy in that case contained substantially the same provision as in the present. Referring to the last-quoted provision, the court said: "It appears to us to have had in view the case of a building falling by inherent defect or of withdrawal of support, as by digging away the underlying or adjoining soil. It might perhaps include the case of a building thrown down by a storm or flood or earthquake, but it would be construing the case too liberally in favor of the insurers to hold it to include the case of the destruction of a building by an explosion within the building itself, and of a fire immediately ensuing on and connected with such explosion, the measure of the liability for which had been carefully and previously defined in the previous provisions of the policy."

We do not overlook the claim of defendant's counsel that the standard policy is in a form prescribed by state authority, and should no longer be subject to the rule that such contracts are to be construed most favorably to the insured. We need not determine how far this rule of construction should be held modified by the conditions stated. The terms employed in this policy have been in previous use in insurance contracts, and, as we have seen, had had a judicial construction. It is to be assumed that these terms were used in this policy in the sense in which they were previously used and defined. The same consideration answers defendant's suggestion that the words "damage by fire" should be limited to loss by actual burning. It is conceded that, in general, the words "loss by fire" include loss by water thrown upon the property, to prevent its destruction by fire; and it is but fair to assume that the language was employed in the statutory policy in view of its previously accepted interpretation. * * * Affirmed.⁵

HORTON v. HOME INS. CO.

(Supreme Court of North Carolina, 1898. 122 N. C. 498, 29 S. E. 944, 65 Am. St. Rep. 717.)

Action by George P. Horton and others against the Home Insurance Company. From a judgment for plaintiffs, both parties appealed.

DOUGLAS, J.⁶ * * * The counsel for the defendant called the attention of the court to section 6 of chapter 299 of the Laws of 1893, wherein it is provided that "the standard fire insurance policy, as prescribed and set out in section 121 of the insurance law of New York,

⁵ Effect of collapse of building in general, see Vance on Insurance, § 172; Cooley, Briefs on the Law of Insurance, vol. 2, pp. 1609-1611; vol. 4, p. 3029. The "falling building" clause is not contained in the standard form of policy adopted in Maine, Massachusetts, Minnesota, and New Hampshire. What constitutes loss by fire in general, see, post, p. 361.

⁶ Part of the opinion is omitted.

shall be exclusively used in this state by all fire insurance companies from and after the first day of May, 1893," and insisted that such a policy should be construed in accordance with the decisions of the state from which it came. Whatever force there might otherwise be in the suggestion is fully met by section 8 of the same act, which reads as follows: "All contracts of insurance, the application for which is taken within this state, shall be deemed to have been made within this state, and subject to the laws thereof."

In the determination of a new question, the decisions of other states may be taken as precedents to guide our action, but can never be authorities to reverse the settled ruling of our courts. These two sections are not inconsistent, and, when construed together, become clear in their meaning. The policy is essentially a North Carolina contract, although the form thereof may have been borrowed from another jurisdiction. A suit of homespun is none the less a native production because the pattern by which it was cut came from another state. It was deemed best to have a uniform policy, which would eventually become familiar to our people, and, by repeated adjudications, acquire a settled meaning. The New York form was selected because it had been adopted by the largest insurance state in the country, and was the outgrowth of many years of careful and efficient state supervision. It is none the less a North Carolina contract, solvable under our laws, and determinable by our decisions. The judgment below is affirmed.

WILD RICE LUMBER CO. v. ROYAL INS. CO. OF LIVERPOOL.

(Supreme Court of Minnesota, 1906. 99 Minn. 190, 108 N. W. 871.)

Action by the Wild Rice Lumber Company against the Royal Insurance Company and others. There was a judgment for plaintiff for less than the amount claimed, and both parties appeal.

ELLIOTT, J.⁷ The Wild Rice Lumber Company was the proprietor of a sawmill and lumber yard situated in the village of Ada. During the year 1904 certain insurance companies issued policies agreeing to indemnify the lumber company from loss by fire upon the lumber described therein. The policies were all in the form prescribed by chapter 175, p. 417, Gen. Laws 1895, as amended by chapter 254, p. 468, Gen. Laws 1897. So far as at present material, the policies were identical in form and contained the following description of the property insured. "On lumber (pickets, posts, timber, lath, and shingles, if any) owned by Wild Rice Lumber Company or held in trust or on commission, or sold, but not delivered, piled on blocks [numbers here in-

⁷ Part of the opinion is omitted.

served], and in streets and alleys adjacent to or connecting with said blocks, in Ada, Minn."

Each policy also contained the following statement, known as the "space clause": "In consideration of the issuance of this policy and the basis upon which the rate of premium is fixed, the assured warrants and agrees that a continuous clear space of 200 feet shall hereafter be maintained between the property hereby insured and any wood-working or manufacturing establishment, and that said space shall not be used for handling or piling lumber thereon for temporary purposes, tramways upon which lumber is not piled, alone excepted. But this warranty shall not be construed to prohibit loading or unloading within, nor the transportation of lumber or timber products across such clear space; it being specially understood and agreed by the assured that any violation of this warranty shall render this policy null and void." * * *

On August 15, 1904, there was a loss by fire on lumber belonging to the Wild Rice Lumber Company to the amount of \$4,064. Of this amount, \$3,818 was on lumber which was located less than 200 feet from the sawmill. The Home Insurance Company paid its pro rata share of the loss, but all the other companies denied liability on the grounds (1) that the lumber destroyed was not covered by the policy, and (2) that the policy had ceased to be in force at the time of the fire because of a breach of the warranties contained in the space clause. * * *

The trial court found that the policies were in force, that the manner in which the space between the yard and the mill was used was known to the company before the policy was issued, that the right to claim a breach of warranty had been waived, and that the policies did not cover lumber located less than 200 feet from the mill. Judgment was ordered for the plaintiff for \$233.94, being the value of the lumber which was beyond the 200-foot limit. * * *

If the insurance companies had no right under the statute to require the insured to warrant the maintenance of a continuous clear space of 200 feet between the insured property and the mill, numerous subsidiary questions raised and elaborately argued by counsel are eliminated. The lumber company contends that the provision injects forbidden conditions into the standard policy, and the insurance companies that it merely determines one of the "conditions of insurance" authorized by section 52, c. 175, p. 417, Gen. Laws 1895, and is also expressly authorized by section 1, subd. 2, c. 254, p. 468, Gen. Laws 1897.

A glance at the history of the standard form of policy makes it very clear that the Legislature of this state intended to deprive fire insurance companies of the right to add to or change the terms and conditions of the prescribed form. The right to make such changes and additions is one of the principal distinguishing characteristics of the two classes of standard forms. The Massachusetts and New York standard policies went into effect about the same time and have formed

the models for the legislation in other states. Both states were seeking uniformity of insurance contracts, but Massachusetts did not attempt to deprive the parties of the liberty of making their own contracts. It merely adopted a model which the parties were at liberty to modify at will. But New York went further and determined the form which all must use with the privilege of adopting certain prescribed clauses to cover particular conditions.

The Minnesota act of 1889 imposed upon the insurance commissioner the duty of preparing a standard form of policy which should be obligatory after that year. The New York form was prepared and went into use but the act was declared unconstitutional because it attempted to delegate legislative powers to the insurance commissioner. In 1895 the Legislature adopted the Massachusetts form with such modifications as were necessary to avoid conflict with the valued policy law. Section 53 provided that "a company may write upon the margin or across the face of the policy, or write or print in type not smaller than long primer upon separate slips or riders to be attached thereto provisions adding to or modifying those contained in the standard form."

The insurance companies then adopted a general rider which embraced substantially all the provisions of the New York form. But the Legislature of 1897, amending section 53, c. 175, p. 417, Gen. Laws 1895, in express terms prohibited the making of any changes except such as were specifically enumerated in the statute. The conclusion is inevitable that the Legislature intended to deprive the parties of the right to make insurance contracts in any form except as prescribed by the statute. The statute (section 53, c. 254, p. 468, Gen. Laws 1897) provides that:

"No fire insurance company shall issue fire insurance policies on property in this state other than those of the standard form herein set forth, except as follows, to wit:

"First. A company may print on or in its policies its name, location and date of incorporation, the amount of its paid up capital stock, the names of its officers and agents, the number and date of the policy, and if it is issued through an agent, the words, 'this policy shall not be valid until countersigned by the duly authorized agent of the company at ____.'

"Second. A company may print or use in its policies printed forms of description and specification of the property insured, including permits for the use of electricity, gasoline or the storage of other hazardous or dangerous material or product also for repairs or improvements for the operation or ceasing to operate and for the maintenance of sprinkling or other improvements.

"Third. A company insuring against damage by lightning may print in the clause enumerating the perils insured against, the additional words: 'Also any damage by lightning whether fire ensues or not' and

in the clause providing for apportionment of loss in case of other insurance the words, 'whether by fire, lightning or both.'

"Fourth. A company incorporated or formed in the state may print in its policies any provisions which it is authorized or required by law to insert therein; and any company not incorporated or formed in this state may, with the approval of the insurance commissioner, so print any provision required by its charter or deed of settlement or by the laws of its own state or country, not contrary to the laws of this state.

"Fifth. The blanks in said standard form may be filled in print or in writing.

"Sixth. A company may print upon policies issued in compliance with the preceding provisions of this section, the words 'Minnesota Standard Policy.'

"Seventh. No provision shall be attached to or included in said policy limiting the amount to be paid in case of total loss on buildings to less than the amount of insurance on the same."

The prescribed form with the changes thus authorized is the only form of fire insurance contract authorized by the laws of the state.

But the insurance companies contend that the space clause is in common use and is authorized by the language of section 52, c. 175, p. 417, Gen. Laws 1895. The authorities cited are, with the exception of one from an intermediate New York court, from states which have no standard form, and common use can, of course, confer no rights in the face of the statute. The act of 1895, as we have seen, permitted the contract to be modified by riders, subject to the prohibitions contained in section 25 (page 401); but it required the policy to contain the entire contract. Section 52 provided that "the conditions of insurance shall be stated in full and neither the application of the insured nor the by-laws of the company shall be considered as warranty except they be incorporated in full in the policy." *Coleman v. Retail L. Ins. Ass'n*, 77 Minn. 31, 79 N. W. 588; *Kollitz v. Eq. Mut. L. Ins. Co.*, 92 Minn. 234, 99 N. W. 892.

This section was not repealed by the amendment of 1897, but it cannot be used to restrict the express requirement of the amendatory act. Under the act of 1895, the conditions of insurance were required to be stated in full in the policy and this included such as were prescribed by the statutory form and also such additions and modifications as were made by the parties. Changes and additions are now forbidden except as specifically permitted, but the policy must still contain all the conditions of insurance. Nor is the space clause authorized by subdivision 2 of section 53 as amended. To hold that its provisions are included within "the other improvements" there referred to would be to give the words a strained and unnatural construction.

The parties were not authorized to insert in the policy a provision not contained in the statutory form or expressly authorized by the statute, whereby the insured warranted the maintenance of certain conditions about the premises. But there seems to be no reason why refer-

ence may not be made to the added clause for the description and identification of the property which was intended to be insured. The policy must contain a complete description of the property and the statute authorizes the company to print on its policy forms of description and specification of the property insured. In connection with property of this character, location may be an essential element of description. * * *

The warranty may be held ineffective, but the language clearly shows that the parties did not understand that lumber piled within 200 feet of the mill was insured. The insured, under the decision of the trial court, got exactly what it paid for.

The judgment of the trial court is affirmed on both appeals.

II. Effect of Temporary Breach of Condition *

HINCKLEY v. GERMANIA FIRE INS. CO.

(Supreme Judicial Court of Massachusetts, 1885. 140 Mass. 38, 1 N. E. 737, 54 Am. Rep. 445.)

This was an action by Edwin R. Hinckley against the Germania Fire Insurance Company upon a policy of insurance against fire upon a pool table and other saloon fixtures. At the trial in the superior court a verdict was ordered for the defendant, and the case reported for the consideration of the supreme court.

C. ALLEN, J.^o The report does not state the grounds upon which the ruling rested, that the plaintiff was not entitled to recover. The defendants, in their brief, rely on various objections, which we have considered. * * *

It is then urged that, after the license had expired, the plaintiff kept the insured property, in violation of law, from May 1, 1883, till the last week in June, 1883. The policy was dated March 15, 1883, and the license then existing expired May 1, 1883. The fire occurred on August 6, 1883, and it was conceded that there was no illegal use of the property after the last week of the preceding June, at which time the plaintiff ascertained that his license would not be renewed. The defendants rest their objection on two grounds: First, that the illegality and criminality of the plaintiff's act in respect to the injured property vitiates the policy by operation of law, independently of any

* For discussion of principles, see Vance on Insurance, § 153. See, also, Cooley, Briefs on the Law of Insurance, vol. 3, p. 1883.

^o Part of the opinion is omitted and the statement of facts is rewritten.

express provisions contained in the policy; and, secondly, that under a provision of the policy the right to recover was taken away.

The authorities cited in support of the first proposition do not support it. In *Kelly v. Home Ins. Co.*, 97 Mass. 288, the policy was on intoxicating liquors, which at the time of the insurance, and thereafter to the time of the loss, were intended for sale in violation of law. The policy never attached. There was never a moment when the liquors were not illegally kept; and all that the case decides is that goods so kept at the time when the policy issued, or at the time of the loss, cannot be the subject of a valid insurance. In *Johnson v. Union Ins. Co.*, 127 Mass. 555, the facts were similar. The policy was on billiard tables, balls, cues, etc., kept without a license at the time the policy was issued, as well as at the time of the loss.

The ground of the decision in both of the above cases is stated to be "that the object of the assured in obtaining the policy was to make their illegal business safe and profitable; and that, the direct and immediate purpose of the contract of insurance being to protect and encourage an unlawful traffic, the contract was illegal and void, and the policy never attached." The same facts existed in *Lawrence v. National Ins. Co.*, 127 Mass. 557, note. In *Cunard v. Hyde*, 2 El. & El. 1, the cargo which was the subject of insurance was partly loaded on deck, in violation of law, and while in that condition was totally lost.

In the present case, the plaintiff had a license at the time when the policy issued, and the policy, therefore, was valid when obtained. If it be assumed without discussion that the policy would cease to be operative during the time when the property was kept in use without a license, the question remains whether such temporary illegal use of the property has the effect to avoid the policy altogether, or merely to suspend it during the continuance of such illegal use. There is nothing in the case to show that it was proved, as a matter of fact, that the plaintiff, at the time of taking out the policy, intended to make it cover any illegal use of the property. He may have expected to get his license renewed; or, failing in that, he may have intended to close the place where the property was used, as, according to his own testimony, in point of fact he did. Under this state of facts, we are of opinion that the temporary use of the property without a license, if un contemplated at the time of taking out the policy, would not of itself, and as a matter of law, render the policy void during the whole of the rest of the time which it was to run. If there were any special or peculiar reasons why such absolute invalidity should be declared, they should be made to appear. In the absence of such reasons, such temporary and un contemplated illegal use of the property should not be visited with so severe a penalty as the absolute avoidance of the policy. It does not appear that the defendants were or would be in any way injuriously affected thereby after such illegal use had ceased. They have the benefit of the temporary suspension

of the risk, without any rebate of the premium. There is no hardship to the defendants in requiring them to show an actual injury, or else to avail themselves of the clause in the policy giving them a right to cancel it upon notice, and a return of a ratable proportion of the premium.

There is no rule of law preventing the revival of a policy of insurance after a temporary suspension. "The doctrine that the risk may be suspended, and again revive, without an express provision for the purpose, seems to be within the strictest judicial principles." 1 Phil. Ins. § 975. Accordingly, temporary unseaworthiness, if the ship has become seaworthy again, will not defeat the policy. 1 Phil. Ins. § 730. So as to other stipulations; as, e. g., that of neutral character and conduct. Id. § 975. And in *Worthington v. Bearnse*, 12 Allen, 382, 90 Am. Dec. 152, it was held, on great consideration by this court, that if the assured in a marine policy temporarily parts with his interest in the property insured, and afterwards buys it in again, the policy will revive, if there are no express provisions making it void, and there is no increase of risk. As between the insurer and the assured, there is no reason why the former should be allowed to avail himself of a temporary illegal use like that which existed in the present case, unless it can also be shown that the subsequent risk was thereby increased, or the position of the insurer otherwise injuriously affected. And, as a matter of general policy, it does not seem reasonable to impose upon the assured so severe a consequence as the forfeiture of his policy, in addition to the penalty of \$100, which the legislature have considered adequate as the maximum punishment for his offense against the public. Pub. St. c. 102, § 111.

It is further contended by the defendants that, however, it might be under the general rule of law, the policy contained a provision making it void. In the standard form of policy established by the legislature, which was used in the present case, the matters avoiding a policy are enumerated. Omitting matters not here material, the provision is: "This policy shall be void * * * if the insured shall make any attempt to defraud the company either before or after the loss; or if gunpowder or other articles subject to legal restrictions shall be kept in quantities or manner different from those allowed or prescribed by law; or if camphene, benzine, naphtha, or other chemical oil, or burning fluids shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene, or coal oil may be used for lighting."

In this commonwealth, under the statutes for the regulation of trade, and providing for licenses and municipal regulation of police, there are a great many articles which, in a certain sense, may be said to be "subject to legal restriction." Dogs, fish, nails, commercial fertilizers, hacks, and horses, in cities, may be referred to as examples. It may well be questioned whether, under the maxim *noscitur a sociis*,

the clause in the policy above quoted ought not to be limited in its application to other articles of a character similar to gunpowder, the keeping of which may have a natural tendency to increase the risk. It would be rather a strained construction of this clause to hold that a policy should be void because an unlicensed dog was kept upon the premises; and yet such a dog, being subject to legal restriction, would be kept in a manner different from that allowed by law. It would not be sensible to give to these words the broadest construction of which they are susceptible.

But, irrespectively of this consideration, it is not the necessary meaning of the word "void," as used in policies of insurance, that it shall under all circumstances imply an absolute and permanent avoidance of a policy which had once begun to run; but the meaning of the word is sufficiently satisfied by reading it as void or inoperative for the time being. In Phil. Ins. § 975, it is said: "After it (i. e., the policy) has begun, so that the premium is become due, it surely is but equitable that a temporary non-compliance should have effect only during its continuance. To carry it further is to inflict a penalty on the assured, and decree a gratuity to the insurer, who is thus permitted to retain the whole premium when he has merited but part of it. A forfeiture certainly ought not to be extended beyond the grounds on which it is incurred. * * * And there does not appear to be any good reason why, in the absence of all fraud and all prejudice to the underwriter, the same doctrine should not be applicable to express conditions in the nature of warranties or conditions, unless by the circumstances, or the express provisions of the policy, such application is excluded." In accordance with this doctrine, a provision in a policy that it should be void, and be surrendered to the directors of the company to be canceled, in case of alienation of the property by sale or otherwise, was held to be inoperative for the time being; and the assured, upon acquiring title after a sale of the property by him, was held entitled to recover. *Lane v. Maine Ins. Co.*, 12 Me. 44, 28 Am. Dec. 150. So where a policy provided that "in case of any transfer or termination of the interest of the assured, either by sale or otherwise, without such consent, (i. e., of the company,) this policy shall from thenceforth be void and of no effect," it was held that after such sale the policy revived upon the assured acquiring again the title, and holding it at the time of the fire. *Power v. Ocean Ins. Co.*, 19 La. 28, 36 Am. Dec. 665.

The same rule of construction has been applied to provisions against other insurance. *Obermeyer v. Globe Ins. Co.*, 43 Mo. 573; *New England Fire & Marine Ins. Co. v. Schettler*, 38 Ill. 166; *Mitchell v. Lycoming Ins. Co.*, 51 Pa. 402. The court in Illinois has gone so far as to apply it also to a provision against an increase of risk, which ceased before the loss. *Schmidt v. Peoria Ins. Co.*, 41 Ill. 295; *Insurance Co. of North America v. McDowell*, 50 Ill. 120, 129, 99 Am. Dec. 497. Without at present going beyond what is called for by

the circumstances of the present case, we are of opinion that, assuming the temporary use of the property insured, without a license, to come within the prohibition of the policy in the clause above quoted as to gunpowder or other articles subject to legal restriction, yet that clause is not to receive such a construction as to prevent the policy from reviving after such temporary use has ceased. * * * New trial granted.¹⁰

III. The Subject of Insurance—Location¹¹

VILLAGE OF L'ANSE v. FIRE ASS'N OF PHILADELPHIA.

(Supreme Court of Michigan, 1899. 119 Mich. 427, 78 N. W. 465, 43 L. R. A. 838, 75 Am. St. Rep. 410.)

Action by the Village of L'Anse against the Fire Association of Philadelphia. There was a judgment directed for defendant, and plaintiff brings error.

LONG, J. On April 9, 1896, the defendant issued its policy of insurance to the plaintiff for the term of one year from April 19, 1896. The policy provides that the association does "insure village of L'Anse * * * against all direct loss or damages by fire, except as hereinafter provided, to an amount not exceeding \$1,500, to the following described property, while located and contained as described herein, and not elsewhere, to wit: \$400 on the two-story frame, shingled roof, fire-engine house, situate detached 70 feet, in the village of L'Anse, Baraga county, Michigan; \$700 on steam fire engine and heater attached; \$200 on hose and hose pipe; \$300 on hose cart, tools, and machinery not enumerated,—all contained in above-described building. \$1,500 other concurrent insurance noted." Then follows the usual Michigan form of standard policy.

On May 9, 1896, the said steam fire engine, hose, hose pipe, and hose cart, as covered by the policy, were burned and destroyed by fire. None of the above property was in the building at the time it was

¹⁰ Accord: *Tompkins v. Hartford Fire Ins. Co.*, 22 App. Div. 380, 49 N. Y. Supp. 184 (1897; breach of mortgage clause). Contra: *Concordia Fire Ins. Co. v. Johnson*, 4 Kan. App. 7, 45 Pac. 722 (1896; illegal use). Compare *Kyte v. Commercial Union Assurance Co.*, 149 Mass. 116, 21 N. E. 361, 3 L. R. A. 508 (1889), distinguishing the *Hinckley Case*, and holding that, if the temporary breach causes an increase of risk, the policy will be void. But see *Traders' Ins. Co. v. Catlin*, 163 Ill. 256, 45 N. E. 255, 35 L. R. A. 595 (1896), holding that increase of risk makes no difference. See, also, *German Mut. Fire Ins. Co. v. Fox*, 4 Neb. (Unof.) 833, 96 N. W. 652, 63 L. R. A. 334 (1903).

¹¹ For discussion of principles, see *Vance on Insurance*, § 157. See, also, *Cooley, Briefs on the Law of Insurance*, vol. 3, p. 1618.

burned, but was being used in an attempt to extinguish a fire some 200 to 800 feet from the building. The defendant refused to pay the damages claimed by the plaintiff for the loss of the property, on the ground that, under the policy, it was insured only while contained in the building mentioned and described in the policy, and not elsewhere. The action brought to recover on the policy was tried before the court without a jury, and the court found in favor of defendant's contention, and thereupon entered judgment in its favor. Plaintiff brings error.

It is admitted by counsel for plaintiff that the case involves but the one question: What is the proper construction of the words in the policy, "while located and contained as described herein and not elsewhere"? It is argued by counsel that the usual purpose and use by the plaintiff of a fire engine, hose, hose cart, and other appliances described in the policy would be to extinguish fires in the village and that, in order to be so used, it would be, as occasion might require, temporarily out of the engine house, which would be its place of deposit when not in use; that such use must have been contemplated by both parties to the contract; and that such use must be presumed to have been taken into consideration by the defendant in fixing the rate of premium.

It is said by counsel that the words "contained in," etc., and like expressions, were in use before the adoption of the standard form of policy, and had a well-settled meaning, and, if applied to property the natural use of which required it to be kept in one place, the insurance was lost if the property was removed to some other place, but if, however, the property was of a sort that the natural use of it required a temporary removal from the place designated in the policy, and while so temporarily absent was destroyed, it was covered by the policy: that the words, "contained in," etc., were of further description, and indicated the place of deposit, when the property was not necessarily absent. It is therefore contended that, in framing the standard policy, the intention was to express and adopt this construction. On the other hand, counsel for the defendant claims that, even under the old forms of policy, the insurance did not continue while the property was removed from its place of deposit, where the limitations were as contained in this policy, to wit, "while located and contained as described herein, and not elsewhere."

We think the cases cited by counsel for plaintiff clearly distinguishable from the policy in suit. Here the words are plain and unambiguous, and are not susceptible of construction other than that which the words themselves import. "While located and contained as described herein, and not elsewhere," means that the policy covered the property only while in that particular building, and did not cover it while it was anywhere else.

In *Green v. Insurance Co.*, 91 Iowa, 615, 60 N. W. 189, the words of the policy were, "while contained in the two-story brick and frame

dwelling house," etc. The court, in speaking of other cases to which its attention had been called by counsel for plaintiff, said: "This contract is widely different from those in the cases cited. The evidence shows that the property was kept sometimes in the chapel and sometimes in the house, and part of it used in both places; and if we assume that the parties, when making the contract, knew of this, we have additional reason for limiting the liability to losses while in the house. It is sufficient to say that the liability is thus limited, and the courts have no right to extend it." This case was followed by *Lakings v. Insurance Co.*, 94 Iowa, 476, 62 N. W. 783, 28 L. R. A. 70.

In *Bahr v. Insurance Co.*, 80 Hun, 309, 29 N. Y. Supp. 1031, the limitation in the policy was, "while located as described herein, and not elsewhere, to wit, while contained in the frame building occupied as a wheelwright shop," etc. The carriage was burned in a livery stable a block and a half away from there. Judgment for plaintiff was had below, and the court said: "This judgment cannot stand. The location of the insured property was a warranty, a breach of which avoided the policy." This rule was recognized by this court in *Willey v. Insurance Co.*, 52 Mich. 446, 18 N. W. 212, and *English v. Insurance Co.*, 55 Mich. 273, 21 N. W. 340, 54 Am. Rep. 377.

The court below was not in error in directing judgment in favor of defendant. That judgment must be affirmed. The other justices concurred.¹³

IV. The Interest of the Insured ¹³

LANE v. PARSONS, RICH & CO.

(Supreme Court of Minnesota, 1906. 97 Minn. 98, 106 N. W. 485, 7 Ann. Cas. 1144.)

In the matter of the receivership of the Millers' & Manufacturers' Insurance Company; Freeman P. Lane and Hugh V. Mercer, receivers. From an order disallowing the claim of Parsons, Rich & Co., they appeal.

ELLIOTT, J.¹⁴ This is an appeal from an order of the district court approving and confirming the action of the receivers of the Millers'

¹³ The clause construed in this case is contained in the standard policy forms of New York, Connecticut, Louisiana, Michigan, Missouri, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Dakota, and Wisconsin. It is not contained in the forms adopted in Maine, Massachusetts, Minnesota, and New Hampshire.

¹³ For discussion of principles, see Vance on Insurance, §§ 158-160. See, also, Cooley, Briefs on the Law of Insurance, vol. 2, pp. 1327-1391.

¹⁴ Part of the opinion is omitted.

& Manufacturers' Insurance Company in disallowing the claim of Parsons, Rich & Co. against the insolvent corporation. The facts upon which the claim against the company arose are practically agreed upon by the parties. The policy was issued June 21, 1903, and by its terms insured the firm of Parsons, Rich & Co. against loss or damage by fire upon the property described therein in the sum of \$1,000 from the date thereof until May 20, 1904. On February 20, 1904, the insurance company became insolvent, and Freeman P. Lane and Hugh V. Mercer were appointed receivers. A fire occurred on August 21, 1903, and the property covered by the policy was partially destroyed. A claim was duly made and filed and disallowed by the receivers. It is conceded that if there is any liability on the part of the company or the receivers it is for the sum of \$830.

The policy in question covered a brick and frame building and additions thereto, located upon certain lots in Newton, Iowa, and used by the insured in connection with its manufacturing business. It also covered the stock and machinery described in detail in the policy. The policy contained the following provisions: "This entire policy shall be void if the insured has concealed or misrepresented, in writing or otherwise, any material fact or circumstance concerning this insurance or the subject thereof; or if the interest of the insured in the property be not truly stated herein. * * * This entire policy, unless otherwise provided by agreement indorsed thereon, or added thereto, shall be void * * * if the interest of the insured be other than unconditional and sole ownership or if the subject of insurance be a building on ground not owned by the insured in fee simple. * * *"

No written application was made for the insurance, and no written or oral representations of any kind or character were made by the applicant. When the policy was issued, and until the time of the trial, the title to the lots upon which the insured building was situated was not in Parsons, Rich & Co., but was in George W. Parsons. This fact was not known to the insurance company or to any of its agents or representatives until after the loss. * * *

The appellant contends: (1) That, in the absence of any inquiry or application or representation, the condition in the policy as to title and ownership did not apply to the then existing condition of the title, but referred only to subsequent changes in the title. (2) That under the circumstances the insurer should be held to have known of the actual condition of the title, and to have waived the provisions in the policy with reference to sole title and ownership at the time of the issuance of the policy. * * *

The policy provides that "this entire policy * * * shall be void * * * if the interest of the insured be other than unconditional and sole ownership, or if the subject of insurance be a building on ground not owned by the insured in fee simple." There are some authorities which hold that this provision refers only to subsequent

changes in the title, but they rest upon an unnatural construction of the language of the policy. The words used refer to the present and not to the future, and the conditions relate to facts as they exist at the date of the policy. * * *

The entire policy is not set out in the record, but we presume that it contains the usual provisions with reference to the effect of alienation and change of title. The contract was made in Iowa, and the form commonly in use in that state provides that it "shall be void if any change or diminution other than by the death of the insured take place in the interest, title, or possession of the subject of the insurance." The legal effect of future changes in the title is provided for by this provision, and the provisions relating to title and ownership refer to conditions at the time of the inception of the contract. * * *

The form of policy now in common use requires the insured to disclose the extent and nature of his interest in the property, as it is a matter which largely influences underwriters in taking or rejecting risks and estimating and figuring premiums. * * * But it is contended that, where the policy is issued by an insurance company without a written application, the company must be held to have waived the condition of the policy as to title and ownership. This does not appear to be an open question in this jurisdiction, as we have in two instances held contrary to the appellant's contention. * * *

It is claimed that the company waived the right to insist upon the breach of condition by issuing the policy without making full inquiries as to the true facts. We are unable to see any grounds for either a waiver or an estoppel in the facts disclosed by this record. A waiver means the intentional relinquishment of a known right. *Dawson v. Shillock*, 29 Minn. 191, 12 N. W. 526; *Fraser v. Ætna Life Ins. Co.*, 114 Wis. 510, 523, 90 N. W. 476. As said in *Stackhouse v. Barnston*, 10 Ves. 466, a mere waiver signifies nothing more than an expression of an intention not to insist upon a known right. In *Warren v. Crane*, 50 Mich. 300, 15 N. W. 465, it was said that waiver is a voluntary act, and implies an election by the party to dispense with something of value, or to forego some advantage which he might at his option have demanded and insisted on. Both intent and knowledge actual or constructive, of the facts, are therefore essential elements. *Schreiber v. Insurance Co.*, 43 Minn. 367, 45 N. W. 708; *Pence v. Langdon*, 99 U. S. 578, 25 L. Ed. 420. The intent may be inferred from facts and circumstances, as well as found in declarations of the parties, and the knowledge may also be either actual or constructive. *Fraser v. Ætna Life Ins. Co.*, 114 Wis. 510, 90 N. W. 476. But, as said in *St. Paul F. & M. Ins. Co. v. Parsons*, 47 Minn. 352, 50 N. W. 240: "Nor, in general, where the facts do not constitute an estoppel, should one who neither knows the fact of the forfeiture nor is chargeable with fault in not knowing it be held to have waived the same by acts or conduct not intended to have such an effect." * * *

In the present case it is not claimed that there is any evidence even

tending to show that any agent or officer of the insurance company had any information as to the condition of the title to the real estate before the policy was issued. We are asked to presume that the insurer by issuing the policy without investigation on its part, intended to waive facts and conditions of which it had neither actual nor constructive notice. The great weight of authority supports the rule that an insurance company will not be permitted to take advantage of a condition contained in a policy to avoid payment of a loss, when the facts rendering the policy void by its terms were known to the insurer directly or through its agent at the time it issued the policy and accepted the premium. This doctrine rests upon the ground that facts made known to an agent of the company, when acting as such, are in law known to the principal, and that a fraud would be perpetrated if an insurance company, through its agent, was allowed to deliver its policy and accept the premium with knowledge of facts which under its provisions rendered it void, *ab initio*, and thereafter assert its invalidity. * * *

The rule meets with our entire approval. But in the present case neither the company nor its agent had knowledge of the conditions, nor are there any facts upon which to base a waiver, unless they are to be presumed from the mere fact that the policy was issued. * * *

In the case now under consideration there was no written application, no questions were asked by the agent, and no representations, other than by implication, were made by the applicant in regard to the ownership of the property or the condition of the title; and there is nothing to show that the agent had any knowledge of the actual facts. The policy in question, having been issued to Parsons, Rich & Co. without the company or its agent having any information or knowledge of the fact that the title of the lots upon which the insured building stood was not in the insured, was void *ab initio* by its own terms, and is unenforceable unless the insurer, after the loss, waived its right to assert the forfeiture. The difficulty with the cases which support the appellant's contention is that they raised an estoppel or imply a waiver from conditions of which the insurer had no knowledge. The waiver rests on an implication arising out of an assumption. If the insurer had knowledge actual or implied, through its agent, when the policy issued, that the existing conditions created a ground of forfeiture under the terms of the policy, a basis for waiver would have existed, and the insurer could not thereafter have claimed a forfeiture. Issuing the policy with such knowledge would have been inconsistent with an honest intention to claim a forfeiture for a breach of the condition.

We are not inclined to restrict the application of the doctrine of waiver as heretofore applied by this court to the conditions contained in insurance contracts. It has been an efficient means by which to prevent insurers from treating the contract as valid when it is to their interest, and repudiating it when called upon to respond to its burdens, thus playing fast and loose with the insured. But the rule contended

for seems to us to require an unreasonable extension of the doctrine. The written contract says, in language plain and unambiguous, that it shall be of no force and effect unless certain conditions then exist, and the existing facts are necessarily known to the insured. It is argued that the law must assume that all such conditions were known to the company, and, after having assumed this material and essential fact, again presume that it intended to waive any results arising therefrom to its advantage. But the insured knew the condition of his title, and, when he received the policy, must, if he read it, have known that the insurer had entered into the contract upon the understanding that the applicant had full ownership and a fee simple title to the lots upon which the building stood. The modern fire insurance policy is practically free from the stipulations, conditions, and provisions set in infinitesimal type and hidden away in elusive locations, which served as traps for the guileless and unwary of the past generations of insured. But the most of these objectionable features have been effectually eliminated by the courts or legislatures, and there seems to be no good reason why the present insurance contracts, even while giving the insured the benefit of the doubt when ambiguous language is used, should not be treated like other written contracts between responsible parties. *Kollitz v. Equitable Mut. Life Ins. Co.*, 92 Minn. 234, 99 N. W. 892; *Quinlan v. Prov., etc., Ins. Co.*, 133 N. Y. 356, 31 N. E. 31, 28 Am. St. Rep. 645. * * * Affirmed.¹⁵

JOHANNES v. STANDARD FIRE OFFICE OF LONDON.

(Supreme Court of Wisconsin, 1887. 70 Wis. 196, 35 N. W. 298, 5 Am. St. Rep. 159.)

COLE, C. J. The defense is based upon alleged breaches of the conditions in the policy, which it is claimed exonerate the defendants from all liability for the loss. The policy provided it should be void if there was "any omission to make known every fact material to the risk," and "if the interest of the assured in the property be other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the building insured stands on leased ground, it must be so represented to the company and so expressed in the written part of the policy, otherwise the policy to be void." It is said the facts proven on the trial show a breach of these conditions. There is really no disagreement about the material facts of the case.

¹⁵ The provisions as to sole and unconditional ownership is contained in the standard form of policy prescribed in New York, Connecticut, Louisiana, Michigan, Missouri, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, and Wisconsin. It is not contained in the standard form prescribed in Maine, Massachusetts, Minnesota, New Hampshire, and South Dakota.

It appears that the plaintiff applied to the local agent of the Standard Company for insurance about the first of July, 1883. At this time he had possession of the realty on which the building and insured property were situated, under a land contract upon which he had paid \$100; \$200, the balance of the purchase price, became due and was paid after the policy was issued. The improvements on the land were of greater value than the insurance. The policy was issued and remained in the hands of the agent until the land was paid for and a warranty deed obtained, which was in August, 1883. The plaintiff received the policy from the agent in October following. There was no written application made for insurance, and no representations made, or question asked as to plaintiff's title or interest in the land or building; nothing was said upon that subject. The agent testified that he did not know what the plaintiff's title was in the land or that he held it under a contract of purchase. The plaintiff, however, testified that when he made application for insurance he showed the agent the contract, who took it to obtain a description of the land on which the insured building was situated; and, in answer to a question submitted, the jury found that such was the fact. It is plain, therefore, that the agent had the means of information as to plaintiff's interest in the realty before him, and it is almost incredible that he did not know what his title was. Under the circumstances, the plaintiff cannot be justly charged with an omission to make known the fact that he held the land under a contract for the purchase thereof.

We do not dwell upon these facts nor express any opinion as to how they would affect the liability of the company, providing it was made to appear that the plaintiff was not the sole and unconditional owner of the entire interest in the property within the meaning of the condition relied on. But if the plaintiff is held to the exact language of the condition, which it is perfectly clear he never saw until long after the policy was issued, still the evidence shows that his interest in the property was an entire, unconditional, and sole ownership. He was the real owner of the property in equity and for all purposes of insurance. The condition does not relate to a legal title in fee-simple nor is that the interest described. An equitable title, if sole and unconditional, answers the description fully, and if the property was destroyed the entire loss would fall upon the plaintiff. There is no ground, therefore, for saying there was a misdescription of the nature of the plaintiff's interest in the property. If the company deemed it material that the state of the legal title should be described, it doubtless would have framed the language to call for that information. But it did not. The interest of the plaintiff satisfies the condition as we construe it, as he was in possession and was the sole equitable owner. In the absence of any specific inquiry by the insurers, or express stipulation in the policy, no particular description of the nature of the insurable interest is necessary. *Strong v. Insurance*

Co., 10 Pick. (Mass.) 40, 20 Am. Dec. 507; *King v. Insurance Co.*, 7 Cush. (Mass.) 13, 54 Am. Dec. 683; *Insurance Co. v. Brown*, 43 N. Y. 389, 3 Am. Rep. 711.

But the question before us seems to be settled by the adjudications. In *Hough v. Insurance Co.*, 29 Conn. 10, 76 Am. Dec. 581, an applicant for insurance had described the property in a written application as "his house," and it was so described in the policy. The policy contained the condition "if the interest in the property to be insured is not absolute it must be so represented to the company, and expressed in the policy in writing; otherwise the insurance shall be void." The legal title to the property was in another party, with whom the insured had, at the time of the application, made a parol contract for its purchase, for a price agreed upon, which the insured had agreed absolutely to pay, and a part of which he had paid, and the insured had entered into possession as purchaser, and had made valuable improvements on the property. Upon the claim of the insurance company, in a suit on the policy, that the insurance was void by reason of the omission of the insured to state in his application the condition of the title, the court charged the jury that the plaintiff was to be regarded as the owner of the property, if he had the equitable title, and his interest was such that the loss would fall on him if the property was destroyed. This charge was held to be correct, and that an absolute interest which is so completely vested in the party owning it that he could not be deprived of it without his consent, would satisfy the condition. In *Dolliver v. Insurance Co.*, 128 Mass. 315, 35 Am. Rep. 378, a policy of insurance contained the same condition precisely as the one before us. The insured, at the time the policy was issued, was the owner in fee of the property insured, but had mortgaged it, and also leased it for a term of years. The policy contained no statement of these incumbrances, still it was held that the policy was not thereby avoided. The court say: "The provision is in the body of the policy, and is inserted for the benefit of the insurer. It is to be construed strictly against it, and liberally in behalf of the assured. If, therefore, its terms can be satisfied by a construction which will save the policy, and at the same time accord with the established rules of law, such construction must be adopted." There are numerous cases, which hold that one who has an equitable interest in property may be described as the owner thereof. *Insurance Co. v. Tyler*, 16 Wend. (N. Y.) 385, 30 Am. Dec. 90; *Insurance Co. v. Martin*, 40 N. J. Law, 568, 29 Am. Rep. 271; *Pelton v. Insurance Co.*, 77 N. Y. 605; *Insurance Co. v. Weill*, 69 Va. 389, 26 Am. Rep. 364; *Acer v. Insurance Co.*, 57 Barb. (N. Y.) 68; *Insurance Co. v. Fogelman*, 35 Mich. 482; *Dohn v. Insurance Co.*, 5 Lans. (N. Y.) 275; *Insurance Co. v. Wilgus*, 88 Pa. 107; *Martin v. Insurance Co.*, 44 N. J. Law, 486, 4 Am. Rep. 397; *Insurance Co. v. Haven*, 95 U. S. 242, 24 L. Ed. 473.

In this case, the plaintiff, by the contract and its part performance,

had acquired an absolute vested interest in the property which he could incumber, sell, and which would descend to his heirs. He was not in default in making payments, and was to all intents and purposes the sole owner. The condition in question speaks only of the nature of the interest insured, not of its extent or legal character. The plaintiff's interest fully answered the description in the condition. In *Hinman v. Insurance Co.*, 36 Wis. 159, the assured made a written application in which he falsely represented his interest in the property. He was in default in his payments, and this court held that a representation that he was the sole and undisputed owner of the insured property was in the nature of a warranty, and, being untrue, avoided the policy. The case is distinguishable from the one at bar. The learned counsel for the defendants called our attention to cases which decide that one who has merely an estate for life in premises cannot be regarded as the sole and absolute owner, within the meaning of a condition such as we are considering (*Davis v. Insurance Co.*, 67 Iowa, 494, 25 N. W. 745; *Garver v. Insurance Co.*, 69 Iowa, 202, 28 N. W. 555); or one who has but a lien for a debt, as in *Rohrback v. Insurance Co.*, 62 N. Y. 47, 20 Am. Rep. 451; or a purchaser at an execution sale (*Insurance Co. v. Brennan*, 58 Ill. 158, 11 Am. Rep. 54); or a mortgagee in possession (*Southwick v. Insurance Co.*, 133 Mass. 457; *Walter v. Assurance Co.* [C. C.] 10 Fed. 232); or one who has only a leasehold interest (*Mers v. Insurance Co.*, 68 Mo. 127). But these cases, it is obvious, are not in point here, where the insured was in no default in making payments, and was the equitable owner, having the right to enforce a specific performance of the contract, and obtain the legal title outstanding in his vendor.

It follows from these views that there was no breach of the condition in question shown, and that the judgment must be affirmed.¹⁶

HAIDER v. ST. PAUL FIRE & MARINE INS. CO

(Supreme Court of Minnesota, 1897. 67 Minn. 514, 70 N. W. 805.)

Action by Joseph Haider and the Citizens' Savings Bank of St. Paul against the St. Paul Fire & Marine Insurance Company. Judgment ordered for defendant. From an order granting a new trial, defendant appeals.

CANTY, J. This is an action on an insurance policy insuring a dwelling house against loss by fire. The policy contains the following clause: "This entire policy, unless otherwise provided by agreement indorsed thereon or added thereto, shall be void * * * if the

¹⁶ Partnership property, see *Wood v. American Fire Ins. Co.*, post, p. 339. Effect of colorable transfer in fraud of creditors, see *Forward v. Continental Ins. Co.*, ante, p. 274.

interest of the insured be other than unconditional and sole ownership; or if the subject of insurance be a building on ground not owned by the insured in fee simple."

The case was tried before the court without a jury on a stipulation of facts in which it is stated: That at the time the insurance policy was made and at the time of the loss plaintiff was the owner of a certain lot 1, in the city of St. Paul, but was not the owner of lot 2, adjoining lot 1, and never had or claimed any right or title in or to said lot 2. That, except as hereinafter stated, the house was his property. That the house was 45 feet in length and 16 feet in width, and was built by plaintiff 2 feet of its width on lot 2, without the consent of the owner of lot 2, and so stood 2 feet on lot 2 at the time of the loss. The balance of it was built and stood on lot 1, except that 20 feet of the front end of it stood on the street in front of the ends of lots 1 and 2, which lots abutted on said street. That at the time the policy was issued the defendant's agent personally examined the premises for the purpose of inspecting the house as a risk, and noticed that the house was not in line with the other houses, but stood further out into the street,—nearer the center of the street,—but that the street was then rough, ungraded, and obstructed by rubbish and bushes. That at that time neither plaintiff nor defendant or its said agent knew that any part of said house stood upon said street or on said lot 2, and plaintiff did not discover and was not informed as to the true location of the house as aforesaid until several months after the policy was issued, and about two months before the loss. The court found all of these facts, and thereon ordered judgment for defendant. From an order granting a new trial, defendant appeals.

The only question presented on this appeal is whether the facts above stated constitute a breach of the conditions of the policy above quoted, or any of them, so as to avoid the policy.

There is no breach of the condition providing that, "if the subject of insurance be a building on ground not owned by the insured in fee simple," the policy shall be void. According to the well-established principles of interpretation, there is no breach of this condition until it is totally broken. As plaintiff owned in fee simple a part of the land on which the building was situated, the condition was not broken, although he did not own the other part. Thus, where a policy provided that, if the building should fall, the insurance should cease, it was held that the insurance did not cease when a part of the building fell, and the rest remained standing. *Breuner v. Insurance Co.*, 51 Cal. 101, 21 Am. Rep. 703; *Insurance Co. v. Mette*, 27 Ill. App. 324. So, where the condition was that the premises should not become vacant and unoccupied, it was held not to be broken by the premises becoming partly vacant, when they remained partly occupied. *American Fire Ins. Co. v. Brighton Cotton Manuf'g Co.*, 125 Ill. 131, 17 N. E. 771.

We will now consider the other condition avoiding the policy, "If the interest of the insured be other than unconditional and sole ownership." The front end of the house was built 20 feet upon the street. It must be presumed that plaintiff was the owner in fee of the street in front of his lot to the middle of such street, and that the public have only an easement therein. Then the public had no interest in or title to this house, and can only compel plaintiff to remove the house, which, as against the public, he would have a right to do. Therefore, as between him and the public, he was the sole and unconditional owner of the house.

But the house also stood two feet on lot 2, and it is claimed by appellant that this part of the house had been attached to lot 2, and became a part of it; that the title and ownership of this two feet of the house was in the owner of lot 2, and therefore plaintiff was not the sole and unconditional owner of the house. Plaintiff built the house, was in the exclusive possession of it, insured it in good faith believing that he was the sole owner of it, and up to the time of the loss no one, so far as appears, asserted any adverse claim to any part of it. Is it the meaning of this condition that whenever there is a loss the insurance company may have the lot surveyed, and, if it is found that the building stood an inch, or a tenth of an inch, beyond the line of the lot on land not owned by the insured, the company shall escape liability? Is it the meaning of this clause that, whenever there is a loss, the insurance company may examine with a microscope the title to the land on which the building stood, and, if any flaw is found in that title, the company shall escape liability? In every such instance the statute of limitations might have run in favor of the insured, and he might have continued forever to be the owner of the property as against all the world, were it not for the industry of the insurance company in finding means by which to avoid its liability.

We cannot hold that by the condition in question it was intended to give the insurer a right to assert a defect in the title of the insured, which defect no one else had ever asserted. In the case of *Miller v. Insurance Co.*, (C. C.) 7 Fed. 649, Mr. Justice Wallace, in passing on this same condition in an insurance policy, said: "The defendant's offer of proof was, therefore, nothing more than a proposition to show that the plaintiff, although he had a title to the mill property which apparently vested in him the sole, unconditional, and entire ownership of the property, had a defective title. * * * So long as the plaintiff, under claim of right, had the exclusive use and enjoyment of the insured property, without any assertion of an adverse right or interest in it by any other person, he was the owner of the property. In the ordinary acceptation of the term, who would be considered the owner of real estate except the grantee in possession, when no adverse claim has been made by another?" See, also, *Stevenson v. Insurance Co.*, 26 U. C. Q. B. 148.

We are of the opinion that, as to the defendant insurance company, plaintiff was the sole owner of the house, within the meaning of this policy. The order appealed from is affirmed.

V. Change of Interest, Title, or Possession ¹⁷

WOLF v. THERESA VILLAGE MUT. FIRE INS. CO.

(Supreme Court of Wisconsin, 1902. 115 Wis. 402, 91 N. W. 1014.)

Action by M. J. Wolf against the Theresa Village Mutual Fire Insurance Company. From a judgment for plaintiff, defendant appeals.

CASSODAY, C. J.¹⁸ * * * The more serious question is whether the policy was forfeited by reason of a violation of the other clause of the provision of the policy quoted, to the effect that the entire policy should be void "if any change" should take place "in the interest, title, or possession" of the property, "whether by legal judgment or process or by voluntary act of the insured or otherwise." The answer denies "that the plaintiff owned or had any interest in the buildings or premises mentioned in said complaint at the time of the happening of said loss." That is the particular question litigated upon the trial. The motion for a nonsuit was based upon a supposed change "in the interest, title, or possession" of the property after the making of the contract of insurance, and before the fire. The defendant proved, and the court found, and it is undisputed, that June 28, 1900, some four months prior to the fire, the plaintiff and his wife executed and delivered to the Jos. Schlitz Brewing Company a conveyance of the premises in the form of a warranty deed, which was recorded July 9, 1900. The trial court found that the deed was so given "as security on an open account." It is undisputed that the deed was so given as security, and that at the time of its delivery the Jos. Schlitz Brewing Company gave back to the plaintiff a writing, of which the following is a copy, omitting the description and signatures: "We hereby acknowledge the receipt of the warranty deed of * * *, which we are to hold as collateral security to guarantee the payment of an account of M. J. Wolf, and we agree to deed back this property upon said M. J. Wolf meeting all his obligations to us." It also appears from the evidence that between the time of the delivery of the deed and the fire the running account was constantly changing, the lowest amount at any time being \$1,182.78, and the

¹⁷ For discussion of principles, see Vance on Insurance, § 161. See, also, Cooley, Briefs on the Law of Insurance, vol. 2, pp. 1713-1764.

¹⁸ Part of the opinion is omitted and the statement of facts is rewritten.

highest amount being \$1,839.45. The trial court held, as a conclusion of law, that the deed from the plaintiff to the Joseph Schlitz Brewing Company "was a mortgage, and did not invalidate" the policy.

The defendant contends that the written agreement of the Brewing Company to hold the deed "as collateral security" for "the payment of an account" of the plaintiff and "to deed back" the property to the plaintiff upon his payment of his account, not being recorded, was improperly received in evidence, and therefore should not be considered as supporting the findings. In support of such contention, counsel rely upon section 2243 of the Revised Statutes of 1898. That section is contained in the chapter entitled "Of Alienation by Deed, and the Proof and Recording of Instruments Affecting Title to Land." It was manifestly intended to protect subsequent bona fide purchasers of real estate for value, as prescribed in the two sections of the statute immediately preceding, against such unrecorded defeasance. In construing a statute, regard is to be had to the purpose of the enactment. *Harrington v. Smith*, 28 Wis. 43; *Wisconsin Industrial School for Girls v. Clark Co.*, 103 Wis. 651, 79 N. W. 422. The defendant was not a purchaser of the premises insured in any sense.

If the conveyance avoided the policy, it must be by virtue of a change "in the interest, title, or possession of the" property insured, in violation of the forfeiture clause in the policy. The giving of the deed and taking back the defeasance was nothing more nor less than a mortgage. Did the mere giving of the mortgage constitute such change? This court held several years ago that an execution sale of real estate is in itself no ground of forfeiture under the condition in a policy which provides for the immediate termination of the risk, "if the property be sold or transferred, or any alienation or change take place in the title or possession, whether by legal process or judicial decree, or voluntary transfer or conveyance." *Hammel v. Insurance Co.*, 54 Wis. 72, 11 N. W. 349, 41 Am. Rep. 1. So it has frequently been held that a mortgage upon real estate does not constitute a change in the title or possession of the premises, within the meaning of such a clause in the policy. *Insurance Co. v. Spankneble*, 52 Ill. 53, 4 Am. Rep. 582; *Insurance Co. v. Walsh*, 54 Ill. 164, 5 Am. Rep. 115; *Insurance Co. v. Gibe*, 162 Ill. 251, 44 N. E. 490; *Nease v. Insurance Co.*, 32 W. Va. 283, 9 S. E. 233; *Barry v. Insurance Co.*, 110 N. Y. 1, 17 N. E. 405; *Bank of Glasco v. Springfield Fire & Marine Ins. Co.*, 5 Kan. App. 388, 49 Pac. 329.

But it is contended that, although the mortgage did not operate to change the title or possession, nevertheless that it did operate to change "the interest" of the plaintiff in the property. At first blush there would seem to be some plausibility in the contention. But it is to be remembered that in this and most of the states a mortgage is a mere lien or security. *Slaughter v. Bernards*, 97 Wis. 184, 72 N. W. 977; *Cumps v. Kiyo*, 104 Wis. 656, 80 N. W. 937. In this last case the mortgage consisted of a deed absolute in form with a

defeasance back, as here. We are not aware that the precise question here presented has been determined in this court. In Ohio, under a clause in the policy substantially like the one in question, it was held that the giving of a mortgage did not avoid the policy, and that "the words 'title' or 'possession,' as here used, mean an actual change in law and equity, and the word 'interest' means a change in the insurable interest of the owner of the property, neither of which is affected by the execution of a mortgage." *Fire Office v. Clark*, 53 Ohio St. 414, 42 N. E. 248, 38 L. R. A. 562. In that case, as here, the mortgage was in the form of a deed absolute, with a defeasance. So it has been held in Texas that "the execution of a mortgage on the real estate on which the building insured is situated is not a change of interest within the meaning of the condition in a policy declaring the policy forfeited 'if any change other than the death of the insured take place in the interest, title, or possession of the subject of the insurance.'"¹⁹ *Lampasas Hotel & Park Co. v. Phoenix Ins. Co.* (Tex. Civ. App.) 38 S. W. 361; *Same v. Home Ins. Co.*, 17 Tex. Civ. App. 615, 43 S. W. 1081. It will be observed that the language of the forfeiture clause in the policy in that case was the same as in this. The same is true of the case of *Peck v. Insurance Co.*, 16 Utah, 121, 51 Pac. 255, 67 Am. St. Rep. 600, where the deed was absolute in form, but given to secure the payment of a debt.

We must hold that the giving of the mortgage did not operate to change the "interest, title, or possession" in the property insured, within the meaning of the policy.

The judgment of the circuit court is affirmed.¹⁹

WOOD v. AMERICAN FIRE INS. CO. OF PHILADELPHIA, PA.

(Court of Appeals of New York, 1896. 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733.)

Action by Jennie M. Wood against the American Fire Insurance Company of Philadelphia, Pa., on a policy of fire insurance. There was judgment for plaintiff, which was affirmed by the general term (78 Hun, 109, 29 N. Y. Supp. 250), and defendant appeals.

O'BRIEN, J. The plaintiff recovered upon a policy of insurance, of which she was the assignee, issued by the defendant, upon a building used as a store, January 9, 1891, and which was destroyed by fire March 31, 1891. The only defenses interposed by the answer, which

¹⁹ The provision is practically the same in the standard forms of policy prescribed in New York, Connecticut, Louisiana, Michigan, Missouri, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, and Wisconsin. In Maine, Massachusetts, Minnesota, New Hampshire, and South Dakota the provision, though varying somewhat in the wording, declares that the policy shall be void if the "property shall be sold."

were proven and found at the trial, were: (1) That Wood Bros., a firm composed of six brothers, which owned the property and procured the insurance, had not, at the time, the sole and unconditional title or ownership of the property; and (2) that the property covered by the policy had been sold upon judgment and execution against the firm some days before the loss. The contract was made by means of what is known as the "standard policy," which contained the condition that it "shall be void * * * if the interest of the insured shall be other than unconditional and sole ownership, or * * * if any change, other than by the death of an assured, take place in the interest, title or possession of the subject of the insurance * * * whether by legal process or judgment, or by the voluntary act of the insured or otherwise."

With respect to the defense first referred to, it appeared that in the year 1885, one of the individuals composing the firm made a general assignment of his individual property for the benefit of his creditors, and also of his interest in the firm; that in 1888 his assignee sold whatever interest in the firm property that passed to him by the assignment to a third party, and before the policy was issued had accounted and been discharged. The assignee had no accounting with the firm in order to ascertain what interest the assignor had, if any, in the surplus, if any, and no claim was ever made upon the firm for anything passing by the assignment. It appeared by the proofs and findings that the defendant's agents, who were, as may be fairly inferred, general agents, knew, at the time of issuing the policy and before, all the facts and circumstances with respect to the individual assignment and the transfer of that interest as above stated. The answer to the defense, based upon these facts, is twofold:

(1) That, since the title to the real estate held by a partnership is in the firm, and not in the individual members of it, the transfer of the interest of one of the members, before the insurance, had no effect upon the unconditional and sole ownership of the firm; that an assignment by one partner of his share in the partnership stock simply transfers any interest he may have in any surplus remaining after payment of the firm debts and the settlement of the firm accounts. Whether the purchaser of such an interest takes anything whatever by the transfer cannot be known until all the partnership affairs have been settled and adjusted. *Menagh v. Whitwell*, 52 N. Y. 146, 11 Am. Rep. 683. The title to the real property, which was the subject of the insurance, was in the partnership firm, and was not affected by the assignment of one of the members. It still remained firm property, since the assignee had no interest in it as such, and whether the sale or transfer by the individual member was anything more than a mere form, or conveyed anything to the assignee, must depend upon the existence of a surplus after the partnership affairs are adjusted. It does not even appear, in this case, that there would then be any surplus to divide, though that circumstance cannot be regarded as material

upon the question whether such a transfer by a member affects or changes the estate or interest which the firm has in the partnership realty.

(2) That general agents of an insurance company may waive stipulations and provisions, contained in the policy, with respect to the conditions upon which it shall have inception and go into operation as a contract between the parties, by delivering it, with knowledge of all the facts, and receiving the premium, has long been settled. It is so obviously just that a party to a written contract should be precluded from defeating it by asserting conditions and stipulations contained in it which would prevent its inception, and which he knew, at the time he delivered it and accepted the benefits, were contravened by the actual facts, that any statement of the reasons upon which the rule rests is no longer necessary. The principle is not a new one, and it has not been shaken by any decisions of this court made since the adoption of the standard policy. *McNally v. Insurance Co.*, 137 N. Y. 389, 33 N. E. 475; *Forward v. Insurance Co.*, 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637.

The restrictions inserted in the contract upon the power of the agent to waive any condition, unless done in a particular manner, cannot be deemed to apply to those conditions which relate to the inception of the contract, when it appears that the agent has delivered it, and received the premiums, with full knowledge of the actual situation. To take the benefit of a contract, with full knowledge of all the facts, and attempt afterwards to defeat it, when called upon to perform, by asserting conditions relating to those facts, would be to claim that no contract was made, and thus operate as a fraud upon the other party.

It appears, from the findings, that on the 20th of March, 1891, about 10 days before the fire, the real estate which was the subject of the insurance was sold by the sheriff under an execution duly issued to him against the firm, and a certificate of sale in due form delivered by him to the purchaser, one Aurelia O. Wood; and the remaining, and perhaps most important, question is whether this sale worked such a change in the interest, title, or possession of the property as to avoid the policy, within the meaning of the conditions to which reference has been made. In *Walradt v. Insurance Co.*, 136 N. Y. 375, 32 N. E. 1063, 32 Am. St. Rep. 752, we held that, when the subject of the insurance was personal property, the conditions of the policy were not violated by the mere levy of an execution upon the goods insured. The reasoning of that case, however, plainly leads to the conclusion that it would be otherwise in case the levy had been followed by a sale. The sale of personal property upon an execution divests the owner of his title to the property sold, and transfers it to another. But what was said in that case with respect to the effect of a sale upon execution applies to personal property. There was no question in the case with respect to the effect of a sale of real estate, and nothing was decided

upon that question. The effect of a sale of real estate upon execution is declared by statute, and no other effect can be given to it. The judgment debtor, or his assignee, or his creditors, may redeem the same within 15 months thereafter, and the right and title of the judgment debtor is not divested by the sale until the expiration of the period for redemption. Code Civ. Proc. § 1440. During that time the debtor is entitled to the possession and use of the rents and profits.

At the time, therefore, that the property in question was destroyed by fire, the interest, title, or possession of the insured had not been changed. The statute had operated to postpone the effect of the sale upon the interest, title, or possession of the owners until the expiration of the period for redemption. In *Browning v. Insurance Co.*, 71 N. Y. 508, 27 Am. Rep. 86, the policy contained a provision that, if the property be sold or transferred, or any change take place in the title or possession, then, in either such case, the policy shall be void. The insured entered into a contract in writing for the sale of the premises, and this court held that the conditions of the policy were not violated. It was said that an executory contract for the sale of the property, without change of possession, did not work a breach of the conditions against a sale or transfer or change in title or possession; that such a condition applies only to a legal transfer which divests the insured of title to or control over the property. Before we could assent to the proposition that in this case there was a breach of the conditions of the policy by the sheriff's sale, we would be compelled to overrule numerous cases in this court which, in principle, decide otherwise. *Baley v. Insurance Co.*, 80 N. Y. 21, 36 Am. Rep. 570; *Cone v. Insurance Co.*, 60 N. Y. 619; *Haight v. Insurance Co.*, 92 N. Y. 51, 55; *Green v. Insurance Co.*, 82 N. Y. 517.

The judgment must therefore be affirmed, with costs.²⁰ All concur, except GRAY, J., who dissents upon the ground that the policy was avoided by the change of interest effected by the sale of the property. Judgment affirmed.

²⁰ Accord: *Greenlee v. North British & Merc. Ins. Co.*, 102 Iowa, 427, 71 N. W. 534, 63 Am. St. Rep. 455 (1897); *Hammel v. Queens Ins. Co.*, 54 Wis. 72, 11 N. W. 349, 41 Am. Rep. 1 (1882). Compare *Collins v. London Assur. Corp.*, 165 Pa. 298, 30 Atl. 924 (1895). And see, generally, *New v. German Ins. Co.*, ante, p. 15; *Kase v. Hartford Fire Ins. Co.*, ante, p. 17; *Quarles v. Clayton*, ante, p. 10. Effect of colorable transfer in fraud of creditors, see *Forward v. Continental Ins. Co.*, ante, p. 274.

VI. Other Insurance ²¹

STAGE v. HOME INS. CO. OF CITY OF NEW YORK.

(Supreme Court of New York, Appellate Division, Fourth Department, 1902.
76 App. Div. 509, 78 N. Y. Supp. 555.)

Action by Augustus E. Stage against the Home Insurance Company of the City of New York. From a judgment for plaintiff, defendant appeals.

SPRING, J. This is an action to recover on a fire insurance policy issued by the defendant to the plaintiff. On the 11th of June, 1900, the plaintiff owned a stock of goods in a store in the town of Crittenden, in the county of Erie, and the same was insured in the Queens & Suffolk Insurance Company in the sum of \$2,800, represented by three policies, one for \$800. At that time the local agent of that company at Corfu, near Crittenden, at the direction of the home company, canceled the policy of \$800, and at his request to the local agent of the defendant the policy in suit was issued in lieu of the one canceled. At the time of the issuance of this policy by the defendant its local agent was apprised of the existence of the policies of insurance in the Queens & Suffolk Company. One of these policies expired December 11, 1900, and another identical in form and amount was issued by the same company in renewal or extension of the one terminating. On the 1st day of April, 1901, and while the policy in controversy was apparently in force, the goods insured were totally destroyed by fire, and the defendant is resisting payment.

The gist of the controversy arises over this provision in the policy: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

The knowledge of the local agent of the existence of the outstanding policies was the knowledge of the defendant, and was tantamount to a waiver of the quoted clause in the policy. *Robbins v. Insurance Co.*, 149 N. Y. 477, 44 N. E. 159; *Forward v. Insurance Co.*, 142 N. Y. 382, 37 N. E. 615, 25 L. R. A. 637; *Skinner v. Norman*, 165 N. Y. 565, 569, 59 N. E. 309, 80 Am. St. Rep. 776. If the defendant knew of the other insurance when it entered into its contract with the plaintiff, and accepted the premium from him, it cannot now, after his goods have been burned, escape payment on the ground that its knowledge was not evidenced by a written indorse-

²¹ For discussion of principles, see *Vance on Insurance*, § 163. See, also, *Cooley, Briefs on the Law of Insurance*, vol. 2, pp. 1438-1454, 1831-1859.

ment on the policy or other written waiver. *Thebaud v. Insurance Co.*, 155 N. Y. 516, 50 N. E. 284; *Wood v. Insurance Co.*, 149 N. Y. 382, 44 N. E. 80, 52 Am. St. Rep. 733; *McElwain v. Insurance Co.*, 50 App. Div. 63, 65, 63 N. Y. Supp. 293; *Sternaman v. Same*, 170 N. Y. 13, 23, 62 N. E. 763, 57 L. R. A. 318, 88 Am. St. Rep. 625.

Each contract involved was a standard policy, and contained a clause that the policy "may by a renewal be continued." The appellant's counsel insists that by accepting a new policy instead of a renewal certificate extending the same the policy in suit was vitiated. We apprehend this margin is too narrow to be successfully maintained. The defendant knew that as part of its contract the plaintiff was permitted to continue each policy in force. Whether in form that extension was by a certificate renewing it or by another policy precisely like the one expiring is of no importance. By either method the contract was exactly the same. The controlling feature here is that the second policy in fact was a renewal or continuation of the prior insurance.

In *Pitney v. Insurance Co.*, 65 N. Y. 6, there was a clause in the policy as follows: "If any other insurance has been or shall hereafter be made upon the said property, and not consented to by the company in writing hereon, then this policy shall be null and void." A new policy was issued in effect renewing the one running out. It was contended in that case that the renewal was a new contract, invalidating the policy issued by the defendant. The court held otherwise, using this language at page 26: "A renewal is in one sense a new contract, but it is not 'other' insurance, within the meaning of the policy. It is but a continuation of an existing insurance. It would be in the highest degree inconvenient to hold that notice must be given on every renewal to other insurers on the theory that it was a new insurance. If the notice of the original insurance is properly given, it must be held to continue through all true renewals of it."

In *Brown v. Insurance Co.*, 18 N. Y. 391, the like principle was enunciated, and in that case nearly three weeks intervened the expiration of the policy and the taking of the new one, which was in fact proved to be in renewal of the former insurance. There is no substantial difference between the clause quoted from the standard policy and that which was the subject of review in the cases cited, and they are consequently decisive of the question now under consideration.

The judgment should be affirmed, with costs to the respondent. Judgment affirmed.²²

²² The provision as to other insurance is substantially the same in the standard forms of policy prescribed in New York, Connecticut, Louisiana, Michigan, Missouri, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, and Wisconsin. In Maine, Massachusetts, Minnesota, New Hampshire, and South Dakota the provision does not contain the words "valid or not."

EDDY v. LONDON ASSUR. CORP.

(Court of Appeals of New York, 1894. 143 N. Y. 311, 38 N. E. 307, 25 L. R. A. 686.)

Actions by Fred C. Eddy, as receiver of the Syracuse Screw Company, against the London Assurance Corporation and seven other insurance companies, on policies of insurance issued by such companies to the plaintiff, as receiver, on property formerly owned by the screw company. Giles Everson was insured by the same policies as mortgagee, as his interest might appear, and was joined as defendant, in order that the rights of all parties might be decided in one action. The policies contained the standard mortgage clause, which provided that the insurance of Everson's interest should not be invalidated by any act or neglect of the mortgagor or owner of the property. The plaintiff failed to recover, and his complaint was dismissed in each action, because of the violation of the provisions in the policies in regard to procuring other insurance. From a judgment of the general term (65 Hun, 307, 20 N. Y. Supp. 216), affirming judgments in each case for defendant Everson, the insurance companies appeal.

PECKHAM, J.²³ * * * Another question arises in regard to the so-called "contribution." It seems that the plaintiff, Eddy, without the consent of these defendant insurers, procured other insurance upon the property. This additional insurance thus procured rendered the policies of these insurers invalid as to the plaintiff. They contend, nevertheless, that in arriving at the proportion of the loss payable by each of them to the mortgagee, this other insurance should be reckoned as part of the insurance on the property. It was procured by plaintiff without the consent or knowledge of the mortgagee, and was not made payable in any event to him, and did not insure his interest in the property. If the claim of these defendant insurers be allowed, the effect is to reduce the amount which each is liable to pay to the mortgagee, and thereby to lessen his total recovery, as he has no claim under the other and additional policies. The clause under which this claim is made provides in the body of the policy that the insurer "shall not be liable for a greater proportion of any loss on the described premises than the amount thereby insured shall bear to the whole insurance, whether valid or not."

I think the courts below were right in rejecting this claim of the insurers. Taken in connection with the language in the mortgage clause, the contract is quite plain. The provision in the latter clause that the insurance of the mortgagee should not be invalidated by any act or neglect of the owner of the property applies, among others, to a case of other insurance of his own interest by the owner without the knowledge or consent of the mortgagee.

²³ Part of the opinion is omitted and the statement of facts is rewritten.

The effect of the mortgagee clause hereinbefore set forth is to make an entirely separate insurance of the mortgagee's interest, and he takes the same benefit from his insurance as if he had received a separate policy from the company, free from the conditions imposed upon the owners. Where the company agreed that the mortgagee's insurance should not be "invalidated" by any act or neglect of the owner of the property, it was not intended to limit the application of that word to a case where the whole policy would otherwise be rendered invalid. The plain and obvious meaning of the language is that the insurance of the mortgagee should not be affected or in any wise impaired or lessened by any act or neglect of the owner. Although contained in the same policy issued to the owner, yet the insurer and the mortgagee were nevertheless entering into a perfectly separate contract of insurance, by which the mortgagee's interest alone was to be insured, and it would be most natural to provide that no act or neglect of the owner should invalidate—that is, impair—any portion of the insurance thus separately secured. Can it for a moment be supposed that a mortgagee would otherwise ever consent to such a contract? His desire is to obtain security, and to that end he insures his interest in the property. Would he knowingly consent that this security should be liable to be wholly frittered away and made valueless by the action of the owner, unknown to him, in procuring insurance upon the owner's interest in the property? Would any sane man agree to hazard his security in such a way? Would he agree that the value of his security should depend upon the acts of a third party over whom he had no control, and of whose acts he might be wholly ignorant? The statement of the proposition is its best refutation. These views are supported by both of the opinions in the case of *Hastings v. Insurance Co.*, 73 N. Y. 141.

There is some difference in the verbiage of the clause in the reported case and that to be found in the clause under examination here. In the *Hastings Case* the clause as to contribution contained the proviso that, in case of other insurance, the assured should recover only a proportionate sum from defendant company. The owner of the property had mortgaged it to plaintiff's testator, and had subsequently obtained an insurance upon his own interest as owner, and subsequent to that time the indorsement in favor of the mortgagee was made, and it was in the body of the policy issued to the owner that the language was used as to the assured. In the clause here under consideration it is seen that the word "assured" is not there, and the condition is that in case of other insurance the company shall not be liable under the policy, etc. The court in the *Hastings Case* thought the word "assured" referred to the person who was first insured when the policy was issued, and was not transferred to the mortgagee when he subsequently, by a minute placed in the policy, was made an assured also. This is very true, but a perusal of the whole case shows that the controlling idea was a separate insurance

of the mortgagee, freed from the conditions attached to the insurance of the owner, and not to be impaired or weakened by any act or neglect of such owner.

Force must be given to this positive language of the contract, and no act or neglect of the owner can be permitted to invalidate—i. e. impair or weaken (73 N. Y. at page 149)—the validity of the agreement for the full amount named in the policy. By taking the insurance in the manner the mortgagee herein did, instead of taking out a separate policy, all the provisions in the policy which from their nature would properly apply to the case of an insurance of the mortgagee's interest would be regarded as forming part of the contract with him, while those provisions which antagonize or impair the force of the particular and specific provisions contained in the clause providing for the insurance of the mortgagee must be regarded as ineffective and inapplicable to the case of the mortgagee. So when the agreement in regard to contribution, contained in the body of the policy issued to the owner, is compared with the specific statement in the mortgage clause that his insurance shall not be invalidated by any act or neglect of the owner, we can only give the latter due force by holding that the insurance of the mortgagee is not, in effect or substance, to be even partially invalidated,—i. e. reduced in amount,—and to that extent impaired and weakened by any act of the owner unknown to the mortgagee. In such case the general agreement in the body of the policy as to contribution does not, and was not intended to, apply. If it did, then the special and particular contract in the mortgage clause would be of no effect. If the two are inconsistent, the special contract, particularly relating to the mortgagee's insurance, must take precedence over the general language used in the policy issued to the owner. For these reasons the claims of the insurers for a deduction in the amount of their liability cannot be allowed.

As to three of the policies, the mortgage clause itself contained the provision that the company was only to be liable in the proportion which the sum it insured should bear to the whole amount of insurance on the property, issued to or held by any party or parties having an insurable interest therein, whether as owner, mortgagee, or otherwise. What meaning is to be attached to this provision after taking into consideration the language heretofore quoted that the insurance of the mortgagee will not be invalidated by any act or neglect of the owner of the property?

The act of obtaining this additional insurance was the act of the owner, and it was unknown to the mortgagee, and of course not consented to by him. The additional insurance could by no possibility benefit him, as it was not upon any interest of his in the property. He could not, therefore, resort to any of these additional policies for his indemnity. It is not a case of contribution in any sense, but simply one, on the insurers' theory, of diminution of their liability, caused by the act of the owner and unknown, and with no possible corresponding benefit to the mortgagee. As a general principle, it is settled that, be-

fore this apportionment of the loss between different companies can be demanded, the different policies must have been upon the same interest in the same property or some part thereof. *Lowell Manuf'g Co. v. Safeguard Fire Ins. Co.*, 88 N. Y. 592. Has this principle been changed by this contract? Can it be that the mortgagee would knowingly consent to a diminution of this liability to an extent which might leave it of no value, consequent upon a secret act of a third party, and where by no possibility could he protect his security from such danger?

All the reasoning given under the head last above discussed applies with equal force here, at least so far as the probabilities of entering into such a contract by the mortgagee are concerned. It is clear that the only object of the mortgagee is to obtain a security upon which he can rely, and this object is, of course, also plain and clear to the insurer. Both parties proceed to enter into a contract with that one end in view. In order to make it plain beyond question, the statement is made that no act or neglect of the owner with regard to the property shall invalidate the insurance of the mortgagee. When, in the face of such an agreement, entered into for the purpose stated, there is also placed in the instrument a provision as to the proportionate payment of a loss, we think the true meaning to be extracted from the whole instrument is that the insurance which shall diminish or impair the right of the mortgagee to recover for his loss is one which shall have been issued upon his interest in the property, or when he shall have consented to the other insurance upon the owner's interest. This may not, perhaps, give full effect to the strict language of the apportionment clause, but, if full effect be given to that clause, and it should be held to call for the consequent reduction of the liability of the insurers in such a case as this, then full effect is denied to the important and material, if not the controlling, clause in the contract, which provides that the insurance of the mortgagee shall not be injuriously "impaired or affected" by the act or neglect of the owner. As used in these mortgage clauses, this is the meaning of the word "invalidate." *Hastings v. Insurance Co.*, 73 N. Y. 149.

We must strive to give effect to all the provisions of the contract, and to enforce the actual meaning of the parties to it, as evidenced by all the language used within the four corners of the instrument. We are also at liberty to consider the purpose for which the contract was executed, where that purpose plainly and necessarily appears from a perusal of the whole paper. That construction will be adopted in the case of somewhat inconsistent provisions which, while giving some effect to all of them, will at the same time plainly tend to carry out the clear purpose of the agreement; that purpose which it is obvious all the parties thereto were cognizant of and intended by the agreement to further and to consummate. There is no equity in this claim on the part of the insurers, and we think, from a perusal of the whole clause in the policy, that it was not intended to, and that it does not, cover such claim.

The judgment of the supreme court must be affirmed, with costs in each case. All concur, except ANDREWS, C. J., not sitting. Judgment affirmed.

HAYES v. MILFORD MUT. FIRE INS. CO.

(Supreme Judicial Court of Massachusetts, 1898. 170 Mass. 492, 49 N. E. 754.)

Action by Clarence H. Hayes against the Milford Mutual Fire Insurance Company to recover damages for breach of contract. Judgment was ordered for defendant, and plaintiff appeals.

LATHROP, J.²⁴ * * * The policy in suit contains, among the printed clauses after the rider, the following: "This policy shall be void * * * if the insured now has, or shall hereafter make, any other insurance on the said property, without the assent in writing or in print of the company." The plaintiff, as the agreed facts state, "on or about October 29, 1895," obtained a policy from the Citizens' Mutual Fire Insurance Company, of Providence, R. I., and on November 4, 1895, obtained another policy from the Security Mutual Fire Insurance Company, also of Providence. Each policy contained a rider similar to that in the policy in suit, and each also contained the following printed clause: "This entire policy, unless otherwise provided by agreement indorsed hereon or added hereto, shall be void if the insured now has or shall hereafter make or procure any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy."

It is clear, under our decisions, that neither of these policies affords any defense to the action. If the Citizens' Company's policy was issued before the policy in suit, it became void by its terms, when the defendant issued its policy. *Forbush v. Insurance Co.*, 4 Gray, 337. If it was issued subsequently, as was the policy of the security company, for the same reason neither it nor the policy of the latter company took effect. *Jackson v. Insurance Co.*, 23 Pick. 418, 34 Am. Dec. 69; *Clark v. Insurance Co.*, 6 Cush. 342, 53 Am. Dec. 44; *Hardy v. Insurance Co.*, 4 Allen, 217; *Thomas v. Insurance Co.*, 119 Mass. 121, 20 Am. Rep. 317.

The fact that the plaintiff has a suit pending against the Citizens' Insurance Company is immaterial. In *Thomas v. Insurance Co.*, ubi supra, the plaintiff had received payment under the subsequent policy, which policy was found to be invalid, and this was held not to affect the plaintiff's rights against the defendant. * * * Reversed.²⁵

²⁴ Part of the opinion is omitted.

²⁵ The difference between the provisions in regard to other insurance in the standard forms of policy prescribed in Massachusetts and in Rhode Island is pointed out in note 22, p. 374.

But see *Funke v. Minnesota Farmers' Mut. Fire Ins. Ass'n*, 29 Minn. 347, 13 N. W. 164, 43 Am. Rep. 216 (1882).

VII. Increase of Risk ²⁶

FIRST CONGREGATIONAL CHURCH OF ROCKLAND v. HOLYOKE MUT. FIRE INS. CO.

(Supreme Judicial Court of Massachusetts, 1893. 158 Mass. 475, 33 N. E. 572, 19 L. R. A. 587, 35 Am. St. Rep. 508.)

Actions by the First Congregational Church of Rockland against the Holyoke Mutual Fire Insurance Company, and five other companies, on fire insurance policies. There was a general verdict for plaintiff directed by the court on special verdicts returned by the jury.

KNOWLTON, J.²⁷ The policies of insurance sued on in these six cases are all alike in containing provisions which are relied on in defense, and which are as follows: "This policy shall be void if.
* * * without the assent in writing or in print of the company.
* * * the situation or circumstances affecting the risk shall, by or with the knowledge, advice, agency, or consent of the insured, be so altered as to cause an increase of such risk; * * * or if camphene, benzine, naphtha, or other chemical oils or burning fluids shall be kept or used by the insured on the premises insured, except that what is known as refined petroleum, kerosene, or coal oil may be used for lighting," etc. The property insured was a church edifice built of wood, not clapboarded, but sheathed horizontally with grooved and tongued sheathing, closely matched together, and painted and sanded on the outside. The paint had peeled and curled, and at the time of the fire the plaintiff was repainting the building. Three trustees had "the control and care of all the real estate belonging to the church." and were authorized to provide for its insurance and repairs. They arranged with one Gilson, a painter, to paint the outside of the building by the day at the rate of \$3 per day for himself, and \$2.75 per day for his men, the trustees furnishing the paint stock, and he furnishing his own brushes, ladders, and other tools of trade. It was also arranged that he was to burn off the old paint with a torch or some such implement, preparatory to repainting. He procured for the purpose a naphtha torch. * * *

The evidence tended to show that the trustees knew that Gilson was to burn off the paint, and left it to him to determine exactly in what way he would do it. One or more of them saw the torch which was used before he began to use it, and they repeatedly saw

²⁶ For discussion of principles, see Vance on Insurance, § 165. See, also Cooley. Briefs on the Law of Insurance, vol. 2, pp. 1492, 1606, 1623, 1633, 1643, 1681, 1781-1784.

²⁷ Part of the opinion is omitted.

him using it before the fire. When the work had been going on about four weeks, the torch, according to the testimony, having been used daily during all the working days, the building caught fire on the edge of a board where there was a crack and where the torch had just been used, and was entirely consumed. This was on the 16th day of July, 1890, and there was evidence that the weather was hot, and the boards very dry. There was also evidence that, as a protection against fire, a pail of water was kept on hand while the work was going on. The evidence tended strongly to show that the danger of a conflagration was greatly increased by the use of the naphtha torch on the dry, inflammable, soft pine boards, with their shrunken joints.

If the risk was increased by the use of the torch, it seems, on the undisputed facts, that it was by the agency and with the knowledge and consent of the insured, for the officers represented the plaintiff in the management of the property, and saw the torch in use, and they authorized the use of it before the work was begun. *Bank v. Cushman*, 121 Mass. 490. Gilson was their agent, acting in the exercise of his discretion and with full authority in procuring and using the naphtha, and on the uncontradicted evidence the use of naphtha by him was a use of it by the insured, within the meaning of the provision quoted from the policies. Was a change of this kind increasing the risk, with the knowledge, agency, and consent of the insured, an alteration of "the situation or circumstances affecting the risk," within the meaning of those words in the policies? These words imply something of duration, and a casual change of a temporary character would not ordinarily render the policy void under this provision. But this change had existed continuously during the working hours of every day for nearly a month, and the work was not nearly done when it was interrupted by the fire. We are of opinion that the change of the condition was sufficiently long continued to be deemed a change in "the situation or circumstances affecting the risk." In the case of *Lyman v. Insurance Co.*, 14 Allen, 329, it was held that an alteration of a building which increased the risk for three weeks was enough to render the policy void under a similar clause.

We find no evidence that naphtha was kept on the premises. The word "kept," as used in the policy, implies a use of the premises as a place of deposit for the prohibited articles for a considerable period of time. See *Williams v. Insurance Co.*, 31 Me. 219; *O'Niel v. Insurance Co.*, 3 N. Y. 122; *Williams v. Insurance Co.*, 54 N. Y. 569, 13 Am. Rep. 620; *Mears v. Insurance Co.*, 92 Pa. 15, 37 Am. Rep. 647; *Putnam v. Insurance Co. (C. C.)* 18 Blatchf. 368, 4 Fed. 753. For nearly four weeks naphtha was used within a few inches of the outer wall of the building to produce the flame which was brought in contact with the building. It would be a narrow and unreasonable construction of the policies, in reference to the purposes for which

the words were inserted, to say that the use of naphtha was not "on the premises," because while in liquid form it was a few inches outside of the wall, when it was made to produce an effect directly on the premises by burning it in the form of gas, and directing it against the building.

On the undisputed facts, as stated in the bill of exceptions, the only ground on which the plaintiff could fairly ask to present a question to the jury is that the use of the naphtha and the change in conditions affecting the risk occurred through making ordinary repairs in a reasonable and proper way, and that in the provisions quoted from the policies there is an implied exception of what is done in making ordinary repairs. It is generally held that such provisions are not intended to prevent the making of necessary repairs, and the use of such means as are reasonably required for that purpose. *O'Niel v. Insurance Co.*, 3 N. Y. 122; *Dobson v. Sotheby, Moody & M.* 90; *Franklin F. Ins. Co. v. Chicago Ice Co.*, 36 Md. 102, 11 Am. Rep. 469; *Billings v. Insurance Co.*, 20 Conn. 139, 50 Am. Dec. 277; *Mears v. Insurance Co.*, 92 Pa. 15, 37 Am. Rep. 647; *Williams v. Insurance Co.*, 31 Me. 219; *Putnam v. Insurance Co. (C. C.)* 18 Blatchf. 368, 4 Fed. 753.

Both parties to a contract for insurance must be presumed to expect that the property will be preserved and kept in a proper condition by making repairs upon it. Policies on buildings are often issued for a term of five years or more. The making of ordinary repairs in a reasonable way may sometimes increase the risk, more or less, while the work is going on, or involve the use of an article whose use in a business carried on in the building is prohibited by the policy. In the absence of an express stipulation to that effect, a contract of insurance should not be held to forbid the making of ordinary repairs in a reasonably safe way, and provisions like these we are considering should not be deemed to apply to an increase of risk, or to a use of an article necessary for the preservation of the property. We are therefore of opinion that if the use of naphtha at the time, and in the manner in which it was used, was reasonable and proper, in the repair of the building, having reference to the danger of fire as well as to other considerations, it would not render the policies void.

But the questions submitted to the jury on the answers to which verdicts were ordered for the plaintiff did not sufficiently present the matters of fact in issue. The only question bearing on the most vital part of the issue was as follows: "Was the method used the method ordinarily pursued to remove paint on the outside of a building, preparatory to scraping it off to repaint it?" The verdicts rendered on an affirmative answer to this question assumed that the removal of the paint from this building was reasonably necessary to the repair of the building. It also assumed that this building, in reference to the danger from moving the flaming torch all over its

external surface, was like ordinary buildings. Many buildings are built of brick, and painted on the outer walls. Many others are clapboarded in such a way as to make a very close, tight covering. If this is the method ordinarily pursued when paint is to be removed from the outside of a building, it does not follow that it is ordinarily pursued when the building is covered with soft pine sheathing, tongued and grooved, and put on horizontally, and when, at the time of doing the work, the weather is very hot and dry, and the boards shrunken so that in some places there are cracks.

Gilson testified that, although he had been a house painter in Rockland 25 years, he had never burned off paint from the outside of a building before. The architect who was consulted by the plaintiff in regard to repairs advised removing the old paint by the application of a paint remover, which was a preparation to be applied by a brush or a sponge. The use of naphtha and the increase of risk by an alteration of the circumstances affecting it were permitted under the implied exception only when reasonably required for the making of repairs. If it was unreasonable to use naphtha under the circumstances, at the time and in the manner disclosed by the evidence, the use was not within the exception, and the policies were avoided. The question for the jury was whether the defendants, if familiar with the condition of the building and the methods usually adopted in making repairs, should have contemplated when they issued the policies that the plaintiff corporation would burn off the paint at such a time and in such a way as it did. Was such a use of naphtha a reasonably safe and proper way of making repairs on this building, under the circumstances? The questions submitted to the jury were not equivalent to these.

As bearing on the question whether the use of a naphtha torch would increase the risk, the defendants might show, if they could, by an expert, in regard to the rates of premium for fire insurance, that the rates on a building whose paint was to be removed from the outside by the use of such a torch would be higher than if there was to be no such use. The relative rates usual for insurance under different circumstances are treated as facts which a jury may consider in determining the degree of the risk. *Luce v. Insurance Co.*, 105 Mass. 297-301, 7 Am. Rep. 522; *Webber v. Railroad*, 2 Metc. 147; *Cornish v. Insurance Co.*, 74 N. Y. 295; *Hartman v. Insurance Co.*, 21 Pa. 466; *Insurance Co. v. Rowland*, 66 Md. 237, 7 Atl. 257. * * * Verdicts set aside.²⁸

²⁸ Compare *Smith v. Insurance Co.*, 107 Mich. 270, 65 N. W. 236, 30 L. R. A. 368 (1895). And see *Aengler v. Western Assur. Co.*, 10 S. D. 82, 71 N. W. 761, 66 Am. St. Rep. 685 (1897), holding that negligence of the insured in the use of kerosene to light a fire in a stove was not within the clause as to increase of risk. See, also, *Straker v. Phenix Ins. Co.*, 101 Wis. 413, 77 N. W. 752 (1898), holding that the erection of a building adjoining the insured

VIII. Assignments ²⁹

BREEYEAR et al. v. ROCKINGHAM FARMERS' MUT. FIRE INS. CO.

(Supreme Court of New Hampshire, 1902. 71 N. H. 445, 52 Atl. 860.)

Action by Joseph Breeyear and others against the Rockingham Farmers' Mutual Fire Insurance Company. Case transferred on agreed facts.

August 23, 1897, Breeyear took out a policy in the defendant company insuring him against loss by fire in the sum of \$700 upon his buildings. Dearborn had a mortgage upon the property to secure the payment of \$700, and the policy was made payable to him as mortgagee in case of loss as his claim might appear. November 26, 1897, Dearborn sold and transferred the mortgage to Louise Beaudry, and assigned his right in the insurance, as follows: "I hereby assign my right as mortgagee to Louise Beaudry." March 29, 1898, Beaudry borrowed \$400 of the Pittsfield Savings Bank, and pledged the Dearborn mortgage as security, delivering therewith to the bank the policy of insurance with the following indorsement upon it, signed by her: "I hereby assign my right to ——" The bank has held the policy ever since. June 23, 1898, Breeyear conveyed the property to Beaudry. June 5, 1899, Beaudry took out a policy in the Granite State Fire Insurance Company insuring her against loss by fire in the sum of \$700 on the same buildings. She did not disclose to the company the existence of the prior insurance. The buildings were destroyed by fire April 21, 1900. No notice of the above-mentioned transfers, or of the conveyance of the property from Breeyear to Beaudry, or of the subsequent insurance, was given to the defendants prior to the fire, and they had no knowledge of the same. The defendants' policy contained a provision that it should be void if, without the assent in writing or in print of the company, the insured had other insur-

premises was an increase of risk within the policy, and avoided the insurance if it was within the knowledge of the insured, though not within his control.

The provision relating to increase of risk is substantially the same in the standard forms of policy adopted in New York, Connecticut, Louisiana, Michigan, Missouri, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, and Wisconsin. In Minnesota, Massachusetts, Maine, and New Hampshire the provision is: "If the situation or circumstances affecting the risk * * * shall be so altered" as to increase the risk. In South Dakota the increase of risk must be occasioned by the agency or act of the insured.

²⁹ For discussion of principles, see Vance on Insurance, § 168. See, also, Cooley, Briefs on the Law of Insurance, vol. 2, pp. 1859-1867.

ance on the property at the time of loss, or if, without such assent, the property should be sold or the policy should be assigned.

CHASE, J.⁸⁰ The assignments by Dearborn to Beaudry and by Beaudry to the bank were not assignments of the policy, but of the assignor's right as mortgagee to the insurance in case of loss as provided in the policy. The object of the provision, which prohibited an assignment of the policy without the assent of the company, was to prevent an increase of the moral risk by the substitution of a person for the insured in whose custody and care the property would be more likely to be burned. The assignments made no such substitution. Breyear continued to be the owner and custodian of the property until he conveyed it to Beaudry, nearly three months after the date of the last assignment. The assignments did not conflict with the terms or the purpose of this provision, and afford no defense to the bank's claim. *Whiting v. Burkhardt*, 178 Mass. 535, 60 N. E. 1, 52 L. R. A. 788, 86 Am. St. Rep. 503; *May, Ins.* § 379.

The conveyance of the property by Breyear to Beaudry, without a corresponding assignment of the policy and an assent thereto in writing or in print by the defendants, was a violation of the provision of the policy relating to that subject, and rendered the policy void as against Breyear and his grantee. It would also render it void as against the bank were it not for the provision protecting the rights of the mortgagee. Without the latter provision, as the bank is not an assignee of the policy but only a payee of the insurance in case of loss, it would have to rely wholly upon the rights of the insured, and would be chargeable with the consequences of his acts upon the validity of the policy. *Baldwin v. Insurance Co.*, 60 N. H. 164; *Hall v. Association*, 64 N. H. 405, 13 Atl. 648. But the provision referred to, in unambiguous terms, differentiates the mortgagee's rights from those of the insured, and places them beyond the power of the latter to imperil. It is as follows: "If this policy shall be made payable to a mortgagee of the insured real estate, no act or default of any person other than such mortgagee or his agents or those claiming under him, shall affect such mortgagee's right to recover in case of loss on such real estate." The policy was made payable to a mortgagee. The insured is a person other than the "mortgagee or his agents or those claiming under him." The bank, as assignee of Dearborn's rights through the intermediate assignments to and from Beaudry, claims under Dearborn, the mortgagee of the insured real estate named in the policy. The bank is a mortgagee of such real estate, within the meaning of the provision. All the conditions of the provision being fulfilled, it applied and prevented the act of Breyear in conveying the property to Beaudry from having any effect upon the bank's rights. *Badger v. Platts*, 68 N. H. 222, 44 Atl. 296, 73 Am. St. Rep. 572; *Whiting v. Burkhardt*, 178 Mass. 535, 60 N. E. 1, 52

⁸⁰ Part of the opinion is omitted and the statement of facts is rewritten.

L. R. A. 788, 86 Am. St. Rep. 503. It also rendered Beaudry's act in procuring other insurance without the defendants' consent harmless so far as the bank is concerned. * * *³¹

IX. Explosive and Inflammable Substances³²

YOCH v. HOME MUT. INS. CO.

(Supreme Court of California, 1896. 111 Cal. 503, 44 Pac. 189, 34 L. R. A. 857.)

Action by Joseph Yoch against the Home Mutual Insurance Company. There was a judgment for plaintiff, and defendant appeals.

HARRISON, J.³³ The defendant issued its policy of insurance against fire to Mrs. W. H. Brooks, the assignor of the plaintiff, in the sum of \$4,000, upon a frame building occupied as a country store, and also upon household furniture and the stock of merchandise, "such as is usually kept in country stores," while contained in said building. Before the expiration of the policy the insured property was totally destroyed, and the present action is brought to recover for the loss thereby sustained. The defendant alleged, as grounds of defense, that the insured kept for sale and allowed gasoline upon the premises, in violation of the terms and conditions of the policy. * * *

In the insurance part of the policy the defendant insured Mrs. Brooks for the term of one year against all direct loss or damage by fire, "except as hereinafter provided," and intermediate this part of the policy and the printed conditions and limitations was written, with pen and ink, the description of the property upon which the insurance was made. One of these printed conditions was as follows: "This entire policy, unless otherwise provided by agreement indorsed herein or added hereto, shall be void * * * if (any usage or custom of trade or manufacture to the contrary notwithstanding) there be kept, used, or allowed on the above-described premises benzine, benzole, gasoline, Greek fire, etc." Testimony was given at the trial tending to show that gasoline is one of the articles of merchandise usually kept in country stores, but that it is customary to keep it in a room or building by itself. It was also shown that, during

³¹ See, also, *New v. German Ins. Co.*, ante, p. 15, and *Kase v. Hartford Fire Ins. Co.*, ante, p. 17.

The standard forms of policy used in the various states contain substantially the same provision prohibiting assignment of the policy before loss.

³² For discussion of principles, see *Vance on Insurance*, § 170. See, also, *Cooley, Briefs on the Law of Insurance*, vol. 2, p. 1687.

³³ Part of the opinion is omitted.

the month prior to the fire, the insured would, in the daytime, bring small quantities of gasoline—one or two cans—from a building on another lot, which was used for storing it, into a room within the insured building, and adjacent to the store, for the purpose of selling it at retail to her customers. * * *

A contract of insurance is to be interpreted by the same rules as is any other contract. It must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable. If it is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible. The whole contract is to be taken together. When it is partly written and partly printed, the written parts control the printed parts, and, if there is any repugnancy between the two, the printed part must be disregarded. It may be explained by reference to the circumstances under which it was made. In cases of uncertainty it is to be interpreted most strongly against the party who caused the uncertainty to exist. Civ. Code, §§ 1636–1654.

Applying these rules to the contract in the present case, it must be held that it was the intention of the defendant to insure gasoline, if it was an article usually kept in country stores, and that, if such was its intention, it was no violation of the policy for the insured to keep gasoline upon the premises as a part of the stock of merchandise. When the defendant agreed to insure a stock of merchandise “such as is usually kept in country stores,” it must be presumed to have known the character of the merchandise which is usually kept in country stores, and that gasoline was one of these articles, and, consequently, that its policy covered all such merchandise. *Harper v. Insurance Co.*, 17 N. Y. 194; *Pindar v. Insurance Co.*, 36 N. Y. 648, 93 Am. Dec. 544. The court would have no judicial knowledge of the character of merchandise which is usually kept in country stores, and it was therefore competent to offer evidence upon that point, for the purpose of enabling it, when interpreting the language of the policy, to understand the matter to which it related, and the circumstances under which it was made. *Elliott v. Insurance Co.*, 13 Gray (Mass.) 139; *Whitmarsh v. Insurance Co.*, 16 Gray (Mass.) 359, 77 Am. Dec. 414; *Archer v. Insurance Co.*, 43 Mo. 434; *Maril v. Insurance Co.*, 95 Ga. 604, 23 S. E. 463, 30 L. R. A. 835, 51 Am. St. Rep. 102; *Fraim v. Insurance Co.*, 170 Pa. 151, 32 Atl. 613, 50 Am. St. Rep. 753; *Wood, Ins.* § 64; *May, Ins.* § 239. When it was shown that gasoline is one of the articles which is usually kept in country stores, the court correctly held that it was a part of the subject of the insurance, and that the insured did not violate the policy by keeping it in stock. The defendant, when it issued the policy in question, knew the character of a country store, and that Mrs. Brooks kept it for the purpose of retailing to her customers all of the articles kept by her, and that the gasoline which she kept was to be disposed of by retail in the same way as the other portion of her stock.

To give to the policy the construction now claimed by the defendant, would be to hold that, although it agreed with her to insure all the stock she usually kept in her store, yet, if she continued to keep that stock, she forfeited all rights under the policy. The clause in the policy above quoted, and which is relied on by the appellant, cannot be construed as having this effect. The qualification therein which excepts the policy from becoming void, viz. "unless otherwise provided by agreement indorsed hereon," is found in the policy itself. The subject-matter of the risk—the stock of merchandise "such as is usually kept in country stores"—was written on the policy by the insurer; and, as the defendant must be deemed to have intended thereby to insure all such articles as are usually kept in a country store, it must be held that this was an "agreement indorsed" upon the policy, which removed the exemption from liability that would otherwise have existed. *Insurance Co. v. De Graff*, 12 Mich. 124. If there be any repugnance between the written phrase, "such as is usually kept in country stores," and the printed clause, "any usage or custom of trade or manufacture to the contrary notwithstanding," the former controls the latter, as being the more deliberate expression of the contracting parties. *Fraim v. Insurance Co.*, 170 Pa. 151, 32 Atl. 613, 50 Am. St. Rep. 753; Civ. Code, § 1651. * * * Affirmed.⁸⁴

X. Vacant or Unoccupied Buildings ⁸⁵

HOME FIRE INS. CO. v. PEYSON.

(Supreme Court of Nebraska, 1898. 54 Neb. 495, 74 N. W. 960.)

SULLIVAN, J. On February 26, 1892, the Home Fire Insurance Company issued to John M. Peyson a policy of fire insurance covering his dwelling house and the household furniture therein contained. On the morning of June 27, 1894, the property was wholly destroyed by fire. The defendant refused to adjust the loss, and Pey-

⁸⁴ Accord: *Ackley v. Phenix Ins. Co.*, 25 Mont. 272, 64 Pac. 665 (1901). See, also, *Mitchell v. Potomac Ins. Co.*, 183 U. S. 42, 22 Sup. Ct. 22, 46 L. Ed. 74 (1901), holding that it must clearly appear that the article is usually included in stock.

The standard forms of policy used in Maine, Massachusetts, Minnesota, New Hampshire, and South Dakota do not contain, in the provision relating to prohibited articles, the words "any usage or custom of trade or manufacture to the contrary notwithstanding." In the other states in which a standard form is prescribed, the provision is substantially the same as that in the New York Standard form.

⁸⁵ For discussion of principles, see Vance on Insurance, § 171. See, also, Cooley, *Briefs on the Law of Insurance*, vol. 2, pp. 1652-1687.

son commenced this action against it in the district court for Dakota county. A trial resulted in a verdict and judgment for the plaintiff, and the defendant brings the record to this court for review.

The company defended the action on the theory that the plaintiff had violated the following condition of the policy: "If the above-mentioned buildings be or become vacant or unoccupied, and so remain for more than ten days without consent indorsed hereon, then in each and every one of the above cases this entire policy shall be null and void." It is now strenuously insisted that the nonoccupancy of the premises at the time of the fire and for six or eight months prior thereto was conclusively proven, and that the trial court should have peremptorily directed a verdict in favor of the defendant.

The evidence is voluminous and conflicting. We cannot present it here nor discuss it at length. It either establishes or tends to prove the following facts: That the insured building was situated in Covington, in this state, just across the river from Sioux City, Iowa, and was the home of Peyson, who occupied it continuously with his wife from the time it was insured until October, 1893, when they both went temporarily to Sioux City to enable Mrs. Peyson to receive medical treatment from a physician of that place; that they did not again regularly occupy the insured premises, but that the plaintiff, who was engaged in business both in Sioux City and Covington, went there frequently and slept there about half the time; that he was never away from the house more than three days at one time, except when he went to Chicago or Waterloo on business; that after the 1st of June he slept in the house almost every day or every night; that between October, 1893, and June, 1894, plaintiff and his wife visited their home together on numerous occasions, cooked meals there, and on May 16th cleaned the house and spent the night there; that during a part of the time the Peysons were at Sioux City they had a rented room and did light housekeeping, removing for that purpose a small portion of their household furniture from Covington; that the plaintiff had no intention of abandoning the premises as his home; that it was always furnished and ready for use; that he held an office in Covington, and received his mail there from two to four times a week; that Mrs. Peyson was sick and receiving medical treatment most of the time while in Sioux City; that on June 11th they gave up the room occupied by them at that place, and Mrs. Peyson went to visit her folks; that during all the time in question Mr. Hall, a neighbor, had a key to the house and exercised some supervision over it.

Now, the jury were justified in finding, and we may assume they did find, that these facts were established by the evidence. Being so established, did they warrant the conclusion reached that the condition of the policy above quoted had not been violated? That is a question of law to be decided by the court. The term "unoccupied," as used in the policy, should be given a fair and reasonable construc-

tion. It should be given the meaning contemplated by the parties when the contract was made. While it was undoubtedly intended that the dwelling house insured should be occupied as the customary and habitual place of abode for the plaintiff and his family, it was not expected that there would be continuous actual occupancy. A policy of fire insurance on a dwelling house should not be construed as an instrument restraining in any manner the assured's ordinary freedom of action. In contracting for indemnity he does not consent to become a captive in his own home.

In the case of *Insurance Co. v. McLimans*, 28 Neb. 846, 45 N. W. 171, it is said: "A party by effecting insurance upon his dwelling does not thereby impliedly agree that he will remain on guard to watch for the possible outbreak of a fire. He insures his property as a precaution against possible loss. If he is indebted, his duty to his creditors requires this; and, if not in debt, his duty to his family may induce him to procure the insurance. He is not to become a prisoner on the property, however, nor to be charged with laches, when, in the pursuit of his business, health, or pleasure, he temporarily leaves the property, which still remains his home. The necessity of most persons for temporary absence on business or family convenience is known to every one, and must have been in the contemplation of the insurer when the policy was issued. A policy of insurance is to be so construed, if possible, as to carry into effect the purpose for which the premium was paid and it was issued." In the case of *Hill v. Insurance Co.*, 99 Mich. 466, 58 N. W. 359, it was held that a dwelling house was not unoccupied, although the owner had been absent on business nearly two months at the time of the fire, and had left home expecting to remain away about four months.

In the case at bar there was very clearly no intention on the part of the Peysons to remove from Covington or to abandon the insured premises as their home. The absence of the family at Sioux City was temporary, and not unreasonably extended; and we feel constrained to hold that the jury, on the evidence, were warranted in finding that the insured premises did not become unoccupied, within the meaning of the policy. The judgment of the district court is affirmed.⁸⁶

⁸⁶ See, also, *Hill v. Ohio Ins. Co.*, 99 Mich. 466, 58 N. W. 359 (1894); *Athens Mut. Ins. Co. v. Toney*, 1 Ga. App. 492, 57 S. E. 1013 (1907); *Hampton v. Hartford Fire Ins. Co.*, 65 N. J. Law, 265, 47 Atl. 433, 52 L. R. A. 344 (1900).

The provision as to vacant or unoccupied buildings is substantially the same in New York, Connecticut, Louisiana, Missouri, New Jersey, North Carolina, North Dakota, Pennsylvania, and Rhode Island. In the Michigan form is contained a clause: "Provided a loss occurs * * * while such breach of condition continues, or such breach of condition is the primary or contributory cause of loss." In the Wisconsin form the words "And continuing until the time of the fire" are added to the provision. In Maine, Massachusetts, Minnesota, New Hampshire, and South Dakota the limit of time is thirty days.

XI. Collapse of Building ³⁷

JOHN DAVIS & CO. v. INSURANCE CO. OF NORTH AMERICA.

(Supreme Court of Michigan, 1897. 115 Mich. 382, 78 N. W. 393.)

For a report of the case, see ante, p. 315.

XII. Liability of the Insurer ³⁸

CANNON v. PHOENIX INS. CO. OF HARTFORD, CONN.

(Supreme Court of Georgia, 1900. 110 Ga. 563, 35 S. E. 775, 78 Am. St. Rep. 124.)

LEWIS, J.³⁹ This was a suit brought in Whitfield superior court by A. E. Cannon against the Phoenix Insurance Company of Hartford, Conn., on an insurance policy issued by the company on plaintiff's stock of merchandise alleged to have been insured, and damaged by fire, the loss amounting to \$3,000, and the defendant's liability therefor, pro rata with other concurrent insurance, being \$300.

On the trial of the case, plaintiff introduced the policy of insurance, one material part of which is as follows: "In consideration of the stipulations herein named, and of thirty-seven and ⁵⁰/₁₀₀ dollars premium, the [said company] does insure A. E. Cannon for the term of one year from the fifteenth day of February, 1897, at noon, to the fifteenth day of February, 1898, at noon, against all direct loss or damage by fire, except as hereinafter provided, to amount not exceeding twenty-five hundred dollars, upon the following described property, to wit: * * * On her stock of merchandise, consisting

³⁷ For a discussion of principles, see Vance on Insurance, § 172. See, also, Cooley, Briefs on the Law of Insurance, vol. 2, pp. 1609-1611; vol. 4, pp. 3018, 3029.

The provision terminating the policy if the building or any part thereof fall except as the result of fire is contained in the standard form of policy prescribed in New York, Connecticut, Louisiana, Michigan, Missouri, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Dakota, and Wisconsin. The standard form of policy prescribed in Maine, Massachusetts, Minnesota, and New Hampshire does not contain the provision.

³⁸ For discussion of principles, see Vance on Insurance, §§ 173-175. See, also, Cooley, Briefs on the Law of Insurance, vol. 4, p. 3006 et seq.

³⁹ Part of the opinion is omitted.

chiefly of dry goods, notions, hats, clothing, caps, boots and shoes," etc.

Plaintiff then offered to read in evidence the proof of loss made and given by plaintiff to defendant, the material part of which is as follows: "To the Phoenix Insurance Company of Hartford, Conn.: By your policy of insurance No. 1,115, issued by your agent at Dalton, Ga., on the 15th day of February, 1897, for the term of twelve months, you insured the undersigned, A. E. Cannon, against loss by fire to the amount of twenty-five hundred dollars on her stock of merchandise, consisting of clothing, dry goods, notions, boots, shoes, hats and caps, while contained in the two-story brick metal-roof building situated at Nos. 553 and 554, on the east side of Hamilton street, Dalton, Ga., block No. 4. On the — day of November, 1897, the same was damaged by fire, in the following manner: In arranging the stove on the ground floor of the building the day before, the pipe thereof, which extended through the ceiling and through the second story of the building, became disengaged at the ceiling of the second floor. When a fire was built in the stove on the morning of the 3d of November, the smoke and soot escaped into the second-story room, where the damaged goods were situated. When the trouble was discovered, the room was full of smoke and soot, and the ceiling where the pipe went through was very hot, and by reason of the smoke and soot, and of the water used in cooling the ceiling, the goods were damaged as here set out."

Then followed in said proof of loss a statement of the other insurance on the same goods, together with a complete inventory of the goods damaged, with the amount of damage claimed thereon. To the introduction in evidence of this proof of loss the defendant objected, on the ground that in said proof of loss it is stated that the goods were injured simply by reason of the smoke and soot, and that there is no allegation in said proof of loss that there was any actual burning of anything except the material put in the stove purposely to burn, and that the said proof of loss did not show, or claim to show, that there was any loss or damage by fire under the terms of the policy. The court thereupon sustained the objection. * * *

Under the stipulations in the policy, there can be no question that, as a condition precedent to the payment of the loss, the proofs of loss should be submitted to the company within the time prescribed. *Southern Home Building & Loan Ass'n v. Home Ins. Co.*, 94 Ga. 167, 169, 21 S. E. 375, 27 L. R. A. 844, 47 Am. St. Rep. 147. The sufficiency of such proofs on the trial of the case is a question for the court, and, to be sufficient, they should show a loss within the terms of the policy. *Travelers' Ins. Co. v. Sheppard*, 85 Ga. 751, 761, 764, 12 S. E. 18. The question, then, is whether the proofs of loss submitted in this case were within the meaning of this policy. It seems that, in arranging the stove on the ground floor of the building the day before the damage, the pipe, which extended through

the ceiling of the second floor, became disengaged at that ceiling, and that, when the fire was built in the stove on the next morning, smoke and soot escaped from the pipe into the second-story room, where the damaged goods were situated. The damage claimed, therefore, in the notice of loss, was by reason of the smoke and soot, and of the water used in cooling the ceiling. It does not appear from the proofs of loss that there was any fire in or about the building, except in the stove where it was intended to be built. This fire did not spread from where it was built and intended to remain. It was therefore, all the time during the alleged injury and damage to the goods, what is termed in the books a "friendly," and not a "hostile," fire.

It is true there is sound authority for the proposition that an insured can recover loss occasioned by smoke, soot, etc., thrown out by a fire; but we think in these cases it will be found that such matter causing injury was the product of a hostile fire. If a fire should break out from where it was intended to be, and become a hostile element, by igniting property, although it might not actually burn the property insured, yet if it caused injury thereto by smoke or heat, or other direct means, damages would be recoverable. But this is not the case. In 1 Wood, Ins. § 103, the following principle is announced, directly applicable to the facts in this case: "Where fire is employed as an agent, either for the ordinary purposes of heating the building for the purposes of manufacture, or as an instrument of art, the insurer is not liable for the consequences thereof, so long as the fire itself is confined within the limits of the agencies employed, as from the effects of smoke or heat evolved thereby, or escaping therefrom, from any cause, whether intentional or accidental. In order to bring such consequences within the risk, there must be actual ignition outside of the agencies employed, not purposely caused by the assured, and these, as a consequence of such ignition, dehors the agencies." This seems to have been an early principle decided in England, and the author refers to that decision in a note to the text just quoted. See *Austin v. Drewe*, 6 Taunt. 436.

In the case of *Gibbons v. Savings Inst.*, 30 Ill. App. 263, it was decided that an ordinary fire insurance policy does not cover a loss caused by escaping steam from a break in steam-heating apparatus. Gary, J., says in his opinion that in principle that case was the same as *Austin v. Drewe*, where, by the omission to open a register, in an upper story of a seven or eight story building, smoke and heat came into lower stories, and caused damage. He quotes the following language from Gibb, C. J., in that case: "There was no fire except in the stove and the flue, as there ought to have been, and the loss was occasioned by the confinement of the heat. Had the fire been brought out of the flue, and anything had been burnt, the company would have been liable. But can this be said where the fire never was at all excessive, and was always confined within its proper limits? This is not a 'fire,' within the meaning of the policy, nor a loss which the com-

pany undertakes to insure against. They may as well be sued for the damage done to drawing-room furniture by a smoky chimney." In the language of Gary, J., in his opinion: "If the fire were a moral agent, no blame could be imputed to it. It was doing its duty, and no more. The damage was caused by another agent, who, undertaking to transmit the beneficial influence of the fire, broke down in the task." See case of *American Towing Co. v. German Fire Ins. Co.*, 74 Md. 25, 21 Atl. 553, and the able opinion of Alvey, C. J., on page 34 et seq., 74 Md., and page 554, 21 Atl.

Neither is the plaintiff entitled to recover any damages by the water used in cooling a portion of the ceiling heated by the pipe. In the proofs of loss it is not claimed that anything was actually ignited by this heat, and it does not appear that the use of the water was necessary to prevent the ignition. * * * Judgment affirmed.⁴⁰

O'CONNOR v. QUEEN INS. CO. OF AMERICA.

(Supreme Court of Wisconsin, 1909. 140 Wis. 388, 122 N. W. 1038, 1122, 25 L. R. A. [N. S.] 501, 133 Am. St. Rep. 1081, 17 Ann. Cas. 1118.)

Action by D. J. O'Connor against the Queen Insurance Company of America. There was a judgment for plaintiff, and defendant appeals.

KERWIN, J.⁴¹ The policy in this case, being the Wisconsin standard form, insured the plaintiff "against all direct loss and damage by fire"; and the controversy is as to whether the loss and damage was caused by anything insured against by the defendant company. The question arises whether the fire which caused the damage was a fire within the meaning of the policy. The plaintiff lived in a rented house heated by a furnace. His servant built a fire in the furnace of material not for use therein or intended so to be used, and of such a highly inflammable character as to cause intense heat and great volumes of smoke to escape through the registers leading into the rooms, and greatly damaged plaintiff's property. The heat was so intense as to char and injure furniture, and the great volumes of smoke and soot greatly injured the furnishings and personal property of the plaintiff. It does not appear from the evidence that there was any

⁴⁰ See, also, *John Davis Co. v. Insurance Co.*, ante, p. 315.

The standard policy contains a provision exempting the insurer from liability for loss caused by explosion unless fire ensues, and in such case the insurer is liable for the damage by fire only. If the explosion is caused by a hostile fire, the company is liable for all the damage. *Mitchell v. Potomac Ins. Co.*, 16 App. D. C. 241 (1900), affirmed in 183 U. S. 42, 22 Sup. Ct. 22, 46 L. Ed. 74 (1901). If, however, the explosion is caused by a friendly fire, as by striking a match, the insurer is not liable for damage caused by the explosion. *Mitchell v. Insurance Co.*, supra; *Heuer v. Northwestern Nat. Ins. Co.*, 144 Ill. 393, 33 N. E. 411, 19 L. R. A. 594 (1893).

⁴¹ The statement of facts is rewritten.

ignition outside of the furnace, although the fire was so intense as to overheat the chimney and flues, and char furniture in the rooms. The evidence shows that the chimney was so hot it seemed as though it was on fire, that the fire was burning fiercely in the furnace, around the mop boards was burned, and the mop boards blistered, the wall paper charred and burned, and the chimney cracked from the excessive heat. It is the contention of appellant that the damage occasioned by heat, smoke, and soot is not covered by the policy where the fire is confined within the furnace. This position involves the construction of the words of the policy "direct loss or damage by fire," and leads to a consideration of what fires are within the contemplation of the policy.

No limitation is placed upon the word "fire" by the language of the policy itself, but it is said that "contracts of insurance are to be construed according to the sense and meaning of the terms which the parties have used, and, if they are clear and unambiguous, the terms are to be taken and understood in their plain, ordinary, and proper sense." No doubt this is the general rule, but it must also be remembered in applying the rule that this and other courts have construed contracts of insurance favorably to the insured. *Karow et al. v. Continental F. Ins. Co.*, 57 Wis. 56, 15 N. W. 27, 46 Am. Rep. 17; *Brady v. Northwestern Ins. Co.*, 11 Mich. 425; *May on Insurance* (3d Ed.) 402; *Peters et al. v. Warren Ins. Co.*, 14 Pet. 99, 10 L. Ed. 371.

Appellant insists that a fire confined within the limits of a furnace, although producing damage by smoke and heat, is not a fire within the meaning of the policy in question, and relies mainly upon the case of *Austin v. Drew*, 4 Camp. 361. In that case the plaintiff was the owner of a sugar factory several stories high with pans on the ground floor for boiling sugar and a stove for heating. A flue extended to the top of the building with registers on each floor connecting with the flue to introduce heat. Because of the negligence of a servant in not opening a register at the top of the flue, or chimney, used to shut in the heat during the night, the smoke, sparks, and heat from the stove were intercepted, and, instead of escaping through the top of the flue, were forced into the rooms, in consequence of which the sugar was damaged. The flames were confined within the stove and flue, and no actual ignition took place outside thereof, and it was held that the loss was not covered by the policy. The Lord Chief Justice said that there was no more fire than always existed when the manufacture was going on, and which continued to burn without any excess. The case seems to turn upon the point that the fire was the usual and ordinary fire, never excessive and always confined within its proper limits. We shall briefly refer to other cases cited by appellant on this point.

In *German American Ins. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77, the loss was caused by an explosion produced by lighting a match, where the policy contained a provision

that the insurers should not be liable for loss by explosion unless fire ensues, and in that event for the damage by fire only. *Samuels v. Continental Ins. Co.*, 2 Pa. Dist. R. 397, was a claim for damages caused by smoke and soot from a lamp whose flame flared up above the lamp. *United L. F. & M. Ins. Co. v. Foote et al.*, 22 Ohio St. 340, 10 Am. Rep. 735, was a case of explosion excepted from the policy, and it was held that the fire was caused by the explosion; therefore the loss was occasioned by explosion. *Renshaw v. Fireman's Ins. Co.*, 33 Mo. App. 394, is also an explosion case caused by ignition from a burning gas jet, and it was held that, where the explosion is the direct result of the antecedent fire, the policy covers it, but, where the explosion is not occasioned by the fire, there is no liability for the result of the explosion. In the one case the fire causes the explosion, and in the other the explosion causes the fire. *Briggs et al. v. North A. & M. Ins. Co.*, 53 N. Y. 446, is a case where the explosion was before the fire, and not caused by the fire. *Transatlantic F. Ins. Co. v. Dorsey*, 56 Md. 70, 40 Am. Rep. 403, was a case of explosion, and the main question was whether the fire was the direct cause of the explosion. 1 Wood on Insurance (2d Ed.) § 103, it is true lays down the general rule that no liability arises where the fire is confined within the limits of the agencies employed, referring to the case of *Austin v. Drew*, supra, with the observation that the doctrine of that case had been considerably misconceived by courts and text-writers. *Gibbons v. German Ins. & S. I.*, 30 Ill. App. 263, was a case of damage caused by the escape of steam. *Case v. Hartford F. Ins. Co.*, 13 Ill. 676, discusses *Austin v. Drew*, 4 Camp. 361, and discards the idea that there can be no loss by fire without actual ignition. *Millaudon v. New Orleans Ins. Co.*, 4 La. Ann. 15, 50 Am. Dec. 550, is a case where the damage was caused by the explosion of a steam boiler, while in *Waters v. Merchants' L. Ins. Co.*, 11 Pet. 213, 9 L. Ed. 691, an explosion of gunpowder is held to be a loss by fire where the thing exploded was on fire. *American Towing Co. v. German F. Ins. Co.*, 74 Md. 25, 21 Atl. 553, was a case of overheated boiler owing to the absence of water. *Austin v. Drew*, supra, is referred to, and it was held damage not covered by the policy. *Cannon v. Phoenix Ins. Co.*, 110 Ga. 563, 35 S. E. 775, 78 Am. St. Rep. 124, is a case where the fire was an ordinary fire in a stove. The fire was what is termed in law books a "friendly," and not a "hostile," fire. In this case the stovepipe became disarranged, and smoke and soot escaped, together with the water used in cooling the ceiling, causing the damage. *Austin v. Drew*, supra, is cited in support of the opinion. It will be seen from the foregoing cases relied upon by appellant that the cases in this country in any way tending to support appellant's contention rest upon the doctrine of *Austin v. Drew*, which has not been extended, but limited to the particular facts of the case, and the doctrine enunciated therein criticised in some well-considered cases.

We shall briefly refer to some of the authorities. At page 929, §

402, Mr. May in his work on Insurance discusses the doctrine laid down in *Austin v. Drew*, and concludes that, if the doctrine in that case is intended to go farther than the facts of the case, it has been deemed not to be good law by every high authority. In *Scripture v. Lowell M. F. Ins. Co.*, 10 Cush. (Mass.) 356, 57 Am. Dec. 111, the doctrine of *Austin v. Drew* is explained, and the court says that lack of study of the case by courts and text-writers has caused it to be misapplied, and refers to the language of the Chief Justice in *Austin v. Drew*, to the effect that the fire was an ordinary one, and no more than always existed when the manufacturing was going on. *Singleton et al. v. Phenix Ins. Co.*, 132 N. Y. 298, 30 N. E. 839, is a case where a boat was loaded with quicklime in barrels. The boat was found to be on fire through the slacking of the lime. It was towed into the river and sunk to prevent total destruction. It was claimed that some water in the boat must have caused the slacking of the lime; held, that the loss was by fire within the meaning of the policy. Further intimated that it may not be necessary to show actual ignition or combustion to establish a loss by fire. In *Way v. Abington M. F. Ins. Co.*, 166 Mass. 67, 43 N. E. 1032, 32 L. R. A. 608, 55 Am. St. Rep. 379, fire in the stove ignited the soot in the chimney, and the smoke and soot from the burning chimney escaped into the room and damaged property. Held, that such damage was covered by the policy insuring against all loss or damage by fire. The case seems to have turned upon the fact that the fire in the chimney was a "hostile" fire; therefore the damage caused by such fire was covered by the policy. In *Lynn G. & E. Co. v. Meriden F. Ins. Co.*, 158 Mass. 570, 33 N. E. 690, 20 L. R. A. 297, 35 Am. St. Rep. 540, it was held under an insurance policy against loss or damage by fire that damage to machinery in a part of the building not reached by the fire caused by short circuiting of electric current was covered by the policy. It was further held that the fire was the direct and proximate cause of the damage under the words of the policy "direct and proximate cause." In *California Ins. Co. v. Union C. Co.*, 133 U. S. 387, 10 Sup. Ct. 365, 33 L. Ed. 730, the words of a policy "direct loss or damage by fire" are defined to mean loss or damage occurring directly from fire as the destroying agency in contradistinction to the remoteness of fire as such agency. In *German American Ins. Co. v. Hyman*, 42 Colo. 156, 94 Pac. 27, 16 L. R. A. (N. S.) 77, under an insurance policy providing that the insurer would not be liable for loss by explosion, it was held that if the fire precedes the explosion, and the latter is an incident of the former and caused by it, the insured may recover for his entire loss, but if the explosion precedes the fire, and is not caused by it, the insured can only recover for the loss by fire. In *Russell v. German F. Ins. Co.*, 100 Minn. 528, 111 N. W. 403, 10 L. R. A. (N. S.) 326, it is held that, to render a fire the immediate or proximate cause of the loss or damage, it is not necessary that any part of the insured prop-

erty actually ignited or was consumed by fire. In *Ermentrout et al. v. Girard F. & M. Ins. Co.*, 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481, the case was on a policy insuring plaintiff "against all direct loss or damage by fire," and the policy further provided that, if the building fell "except as result of fire," the insurance on the building should immediately cease. There was evidence tending to prove that a building adjacent to the one insured caught fire and was partially consumed, and as a result of such fire fell, carrying down with it a partition wall and a part of the insured building. Held, that the fall of the insured building was "the result of fire" and "a direct loss or damage by fire," although no part of it ignited or was consumed by fire.

Cameron in his work on the Law of Fire Insurance in Canada, p. 51, discusses the effect of the word "direct" in policies providing against "direct loss or damage by fire," and says that the word has no significance or value, and whether used or not the fire must be the proximate cause of the loss or damage. See, also, Richards on Insurance Law (3d Ed.) § 231, where it is said that the word "direct" in a policy means immediate or proximate as distinguished from remote, but that the proximate results of fire may include other things than combustion, as, for example, the resulting fall of a building, injuries to insured property by water, loss of goods by theft, exposure of goods during fire. See, also, Elliott on Insurance, § 221, and Clement on Fire Insurance as a Valid Contract, pp. 84-87.

The foregoing cases, we think, fully show that *Austin v. Drew* is not authority against plaintiff here. There the fire was under control, not excessive, and suitable and proper for the purpose intended. It was in the language of the books a "friendly," and not a "hostile," fire. In the case before us the fire was extraordinary and unusual, unsuitable for the purpose intended, and in a measure uncontrollable, besides being inherently dangerous because of the unsuitable material used. Such a fire was we think a "hostile" fire, and within the contemplation of the policy. Ordinarily the question in such cases is for the jury. *New York & B. D. E. Co. et al. v. Traders' & M. Ins. Co.*, 132 Mass. 377, 42 Am. Rep. 440; *New York & B. D. E. Co. et al. v. Traders' M. Ins. Co.*, 135 Mass. 221; Richards on Insurance, § 231.

But in this case the evidence being practically undisputed, we think no error was committed in directing a verdict for the plaintiff. The judgment of the court below is affirmed.⁴²

⁴² See dissenting opinion of Judge Marshall, 140 Wla. 395, 122 N. W. 1122, 25 L. R. A. (N. S.) 506, 17 Ann. Cas. 1121.

XIII. Measure of Insurer's Liability ⁴⁸

FARMERS' FEED CO. OF NEW JERSEY v. SCOTTISH UNION & NAT. INS. CO. OF EDINBURGH.

(Court of Appeals of New York, 1903. 173 N. Y. 241, 65 N. E. 1105.)

Action by the Farmers' Feed Company of New Jersey against the Scottish Union & National Insurance Company of Edinburgh. From a judgment of the appellate division (65 App. Div. 70, 72 N. Y. Supp. 732) affirming a judgment for plaintiff, defendant appeals.

VANN, J. This controversy was submitted upon an agreed statement of the facts, which, so far as material to the appeal, are as follows:

In May, 1898, the defendant, by a policy of the standard form, insured certain buildings belonging to the plaintiff in the city of New York against loss by fire for the term of three years from the 23d of May, 1898, "to an amount not exceeding \$60,000." On the 14th of June, 1900, such insurance to the amount of \$17,500 was canceled by mutual consent, leaving a balance of \$42,500 still in force. The policy contained an apportionment clause, which provided that "this company shall not be liable under this policy for a greater proportion of any loss on the described property * * * than the amount hereby insured shall bear to the whole insurance, whether valid or not, or by solvent or insolvent insurers, covering such property. * * *"

On the 5th of June, 1900, the plaintiff procured other insurance on the same property "to an amount not exceeding \$5,000" in each of the following companies: The Springfield Fire & Marine Insurance Company, the Providence Washington Insurance Company, and the Westchester Fire Insurance Company, and "to an amount not exceeding \$2,500" in the Insurance Company of the state of Pennsylvania; making \$17,500 as the maximum amount for which these four companies could, in any event, become liable. Each of these policies contained a paragraph headed, "Percentage Co-Insurance Clause," of which the following is a copy: "In consideration of the premium for which this policy is issued it is expressly stipulated that in the event of loss this company shall be liable for no greater proportion thereof than the sum hereby insured bears to 80 per cent. of the cash value of the property described herein at the time when such loss shall happen, nor more than the proportion which this policy bears to the total insurance."

⁴⁸ For discussion of principles, see Vance on Insurance, §§ 176, 177. See, also, Cooley, Briefs on the Law of Insurance, vol. 4, pp. 3061-3127.

On the 1st of July, 1900, a fire occurred, by which the property insured, the cash value of which was \$124,660, was damaged to the amount of \$45,321.18, as ascertained by an appraisal duly had.

The plaintiff claims that the amount due from the defendant under its policy "by reason of the fire loss" was \$38,177.26, while the defendant claims that such amount was but \$32,102.50, which it has paid to the plaintiff under an agreement that such payment should be without prejudice. The appellate division rendered judgment in favor of the plaintiff for the difference, between these sums, amounting to \$6,074.76, with interest thereon from November 28, 1900.

The decision of the controversy turns on the meaning of the words "whole insurance," as used in the apportionment clause of the defendant's policy. It was there provided that the defendant should not be liable for a greater proportion of any loss than the amount insured by its policy should bear to the whole insurance on the property. There is no disagreement as to the amount of insurance made by the defendant's policy, which was absolute, but the controversy is over the amount made by the four other policies, which were not absolute, owing to the co-insurance clause. The defendant claims that the whole insurance was \$60,000, comprising the \$42,500 made by its own policy and \$17,500, or the greatest sum for which, in any event, the four companies could become liable, and that the plaintiff was a co-insurer to the extent of the difference between the amount for which they are liable and the maximum amount for which they might be liable. This would reduce the indemnity furnished by the defendant's policy from \$38,177.26, the amount claimed by the plaintiff, to \$32,102.50, the amount paid by the defendant.

The plaintiff claims and the appellate division held, that under the circumstances "the amount of insurance effected by the four policies is identical with the amount of the loss, and that the extent of that insurance could not be ascertained until after a loss, for the insurance was to an amount not exceeding a stipulated sum, and was, therefore, indefinite." This conclusion gives no force to the apportionment clause in the defendant's policy when construed in connection with the co-insurance clause of the other policies. Moreover, all five insurance policies, including that issued by the defendant, are indefinite in the same way, for they all make insurance to an amount not exceeding a sum named which is usually regarded as the amount of insurance effected.

The four companies stipulated that they should "be liable for no greater proportion" of the loss, which was \$45,321.18, "than the sum hereby insured," or \$17,500, "bears to 80 per cent. of the cash value of the property," which was \$99,728. Their liability, therefore, is represented by the following proportion: As \$99,728 is to \$17,500, so is \$45,321.18 to the amount required, or \$7,952.84. Was this "the whole insurance" effected by the four policies containing the co-insurance clause? If so, that clause has no effect in this case. We

think it was not, for, if the loss had been greater, the amount called for by the policies would have been greater also, and yet it could not have exceeded the amount of the insurance. The largest sum which, in any event, can be collected under a policy, and not the smaller sum which may be collected under special circumstances, is the amount of insurance effected by the policy. There is no limit to the possible liability under the four policies, except the amount that the companies stipulated it should not exceed, aggregating \$17,500, which they would have been obliged to pay if the loss had been total.

Under an open policy, if the loss is less than the insurance, the former measures the liability, but if the loss is greater than the insurance, the latter measures the liability; yet in either event the amount of insurance is the same. The amount of the insurance, therefore, is the largest sum that the company, under any circumstances, according to the terms of the policy, can be required to pay. This is the popular understanding, as well as the legal definition. The test is, what is the extent of the indemnity furnished under any possible circumstances? The insurance effected by the four policies was for a proportion of the cash value of the property less 20 per cent., which can always be represented by a fraction, the numerator being unchangeable, while the denominator may vary from time to time. The numerator is the highest amount which the companies could be required to pay, while the denominator is 80 per cent. of the cash value of the property. The amount of the insurance does not vary, but the cash value of the property is subject to change; still that change does not reduce the amount of insurance. The fact that the owner ran his own risk or became his own insurer as to the 20 per cent. of the cash value of the property did not lessen the amount of insurance, because, if the loss had been total, the whole \$17,500 would have been due upon the four policies. Thus the effect of the co-insurance clause is that, if the property is insured to 80 per cent. of its value, or more, in case of a total loss the whole sum insured becomes due; but with insurance for less than 80 per cent. of the value and a loss also of less than 80 per cent. the owner becomes, in effect, a co-insurer proportionately. He could have procured insurance to 80 per cent. of the value, but, not having done so, he became his own insurer pro tanto.

This accords with the way the clause is characterized in the policies, for it is entitled "Percentage Co-Insurance Clause," which means insurance by the company and the owner, depending upon the percentage or proportion which the insurance bears to the value. The object is through lower premiums to induce the owner either to take out insurance to 80 per cent. of value, or to become a co-insurer with less risk to the company in case of a loss falling below such percentage of value. Where either the loss or the insurance equals or exceeds 80 per cent. of value, the clause has no effect, but when both are less the insured and the insurer bear the loss in certain proportions. The amount of insurance is not the variable factor, but the amount of loss.

The amount of insurance is at all times the same, but when the loss is partial the insurer stands only a part, unless the insurance is for the full percentage, whereas, if the loss is total, the insured stands all, not exceeding the limit stated in the policy. That limit is the amount of insurance made by the policy, because the company may be required to pay to that extent.

The words of the co-insurance clause, viz., "the sum hereby insured," indicate the amount of insurance. That sum is fixed, definite, and always the same. It should not be confounded with the actual liability under special circumstances, for all open policies are necessarily indefinite as to the sum to be paid until the amount of the loss is known. The liability can never exceed the value of the property, but the insurance may, for a house worth but \$1,000 may be insured for \$2,000. If thus insured by two companies, one-half in each, and the property was wholly destroyed by fire, neither would have to pay \$1,000, the amount of its policy, but only \$500, the amount of its liability, owing to the apportionment clause. This would be true of a standard policy even if one of the companies was insolvent, so that the insured, by taking out other insurance, may reduce his security while intending to increase it.

In the case before us the plaintiff, by procuring the four policies, reduced his security in the event of a partial loss, but increased it in the event of a total loss. For the purpose of apportionment, the face value of the policies should be resorted to, regardless of the cash value of the property, and thus the whole amount of the insurance can be ascertained by a simple inspection of the policies. The face value of a policy is not reduced by the actual value of the property, or by the duty of apportioning the loss, or by the effect of a co-insurance clause in another policy on the same property. The amount of insurance is fixed at the inception of the policy, but the amount of liability is not fixed until a loss has occurred. The one depends upon the sum for which the policy is written, but the other depends upon a number of contingencies which may or may not happen, and hence cannot be known in advance. The fact that they are not known, and may never come into existence, does not affect the amount of the policy.

The question involved is new, and we are without controlling authorities to guide us, but the discussion of a subject somewhat related in a recent case has aided us in reaching the conclusion announced. *Continental Ins. Co. v. Ætna Ins. Co.*, 138 N. Y. 16, 21, 33 N. E. 724.

It may be asked why, if the whole insurance was \$60,000, the plaintiff is not entitled to recover his entire loss, which was but \$45,321.18; and the answer is that he agreed in a certain contingency to stand part of the loss himself. He accepted four policies, which provided for the payment to him of not exceeding \$17,500 in case of a total loss, or, in case the loss was partial, and his insurance amounted to

80 per cent. of the cash value; but he agreed that, if both loss and insurance were each less than the 80 per cent., to take less than the amount of his loss, and thus became a co-insurer for the difference. The defendant, pursuant to its apportionment clause, is entitled to the benefit of all other insurance, whether made by another company alone or by a contract between another company and the insured, by which, in case of partial loss, each stands part as a co-insurer.

We think that the "whole insurance" was \$60,000, the face value of all the policies, and that the judgment appealed from should, therefore, be reversed, and judgment ordered for defendant on the merits, with costs.⁴⁴

XIV. Cancellation of Policy ⁴⁵

TAYLOR v. INSURANCE CO. OF NORTH AMERICA.

(Supreme Court of Oklahoma, 1909. 25 Okl. 92, 105 Pac. 354, 138 Am. St. Rep. 906.)

Action by William Taylor against the Insurance Company of North America. Judgment for defendant, and plaintiff brings error.

WILLIAMS, J.⁴⁶ The agent of the company, in whose possession the insured left the policy upon which this action was based, was named Comer. On September 26, 1904, Comer met Taylor on the streets of Claremore and said to him: "The insurance company has canceled your policy on your hay." Taylor asked him on what ground, and the agent said: "They did not state." Taylor then said: "Where is my money?" or "How about my money I have paid them, if they have canceled it? How about my money?" And the agent said: "They did not say anything about it." Taylor rejoined: "I guess I can get my money then, if they have canceled it." The agent, Comer, testified that he canceled the policy on September 26, 1904, and on that day returned the same to the company.

It is the contention of counsel for plaintiff in error that the company, under the terms of this policy, could not cancel it except that it at some time tendered or returned to him the unearned premium in accordance with what he argues are its terms, and on account of the fact that this unearned premium was neither returned nor tendered prior to October 9, 1904, that this had the effect of keeping alive the policy and rendering the company liable for the loss.

⁴⁴ Actual cash value at time of loss, see *Liverpool & London & Globe Ins. Co. v. McFadden*, 170 Fed. 179, 95 C. C. A. 429, 27 L. R. A. (N. S.) 1095 (1909).

⁴⁵ For discussion of principles, see Vance on Insurance, § 183. See, also, Cooley, Briefs on the Law of Insurance, vol. 3, pp. 2789-2814.

⁴⁶ Part of the opinion is omitted.

The paragraph of the policy relating to cancellation is what is commonly known as the "New York standard form," and reads as follows: "This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company by giving notice, it shall retain only the pro rata premium."

The construction of this contract is necessary in order to determine whether or not the policy is canceled. If the construction contended for by the defendant in error is correct, the clause was intended to read as follows: "If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company by giving notice (on surrender of this policy), it shall retain only the pro rata premium."

Without the interpolation of the words "on surrender of this policy" in the last clause, there is an ambiguity, and there is equal reason for the following interpretation: "If this policy shall be canceled (at any time at the request of the insured), or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company by giving notice, it shall retain only the pro rata premium."

When the policy is canceled by giving "five days' notice of such cancellation," the company retaining "only the pro rata premium," this cannot be accomplished without a tender, unless the words "on surrender of the policy" are read into said clause; and if that was the intention, why repeat the words "by giving notice"? If that contention is correct, it should have been stated as follows: "This policy shall be canceled at any time at the request of the insured, or by the company by giving five days' notice of such cancellation. If this policy shall be canceled as hereinbefore provided, or become void or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate, except that, when this policy is canceled by this company, * * * it shall retain only the pro rata premium."

To say the least, the cancellation clause is ambiguous, and when we consider that the insurer was skilled, not only in the framing, but also the interpretation, of such contracts, and that the insured had no part in the framing thereof, as well as being unskilled in such inter-

pretation; such construction should be adopted as is more favorable to the insured; and especially is this true when the construction contended for by the insurer is not only inequitable, but also unjust.

The contract of insurance here involved, known as the "New York standard policy," was framed by virtue of chapter 488, p. 720, of the Laws of New York of 1886, providing for a uniform contract of fire insurance to be used by fire underwriters within said state. The clause here under consideration was first before the Supreme Court of the state of New York in the case of *Nitsch v. American Central Insurance Company*, 83 Hun, 614, 31 N. Y. Supp. 1131, wherein a tender was construed to be necessary to the cancellation of the policy. The judgment of the Supreme Court was affirmed by the New York Court of Appeals on March 16, 1897 (152 N. Y. 635, 46 N. E. 1149). Afterwards, on March 1, 1898, in the case of *Tisdell v. New Hampshire Fire Insurance Company*, 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765 (see, also, *Id.*, 11 Misc. Rep. 20, 32 N. Y. Supp. 166), it was again held that a tender was a condition precedent to the cancellation of such a policy—the opinion being delivered by Mr. Justice Bartlett, concurred in by Justices Haight, Martin, and Vann, Chief Justice Parker and Mr. Justice O'Brien dissenting, and Mr. Justice Gray being absent.

Again, in the case of *Buckley v. Insurance Co.*, 188 N. Y. 399, 81 N. E. 165, 13 L. R. A. (N. S.) 889 (see, also, *Id.*, 112 App. Div. 451, 98 N. Y. Supp. 622), the Court of Appeals, following the *Nitsch* and *Tisdell* Cases, said: "It is a question of vital importance to the insurer and the insured as to the precise meaning of the cancellation clause in the standard policy. The situation is not a complicated one, and the court desires to so construe the clause that its meaning may be made clear. If the insurance company desires to cancel, it must, as we have held in the cases cited, not only give the notice required, but accompany it by the payment or tender of the pro rata amount of the unearned premium. It cannot legally demand of the insured the surrender of the policy and its cancellation until this is done." The court was unanimous as to the foregoing conclusion. At that time Chief Justice Cullen, and Justices O'Brien, Haight, Hiscock, Bartlett, Chase, and Vann comprised the court.

In the case of *Philadelphia Linen Co. v. Manhattan Fire Insur. Co.*, 8 Pa. Dist. R. 261, that court, after referring to the *Tisdell* Case, said: "The question which is now before us was then passed upon by the Supreme Court of New York upon a policy where the language was identically the same as that which has been quoted from the defendant's policy. The majority of the court in that case decided that, upon cancellation of the policy by the company, it must return or tender the unearned premium in order to effect a cancellation. The same conclusion seems to have been arrived at by the same court in an earlier case, *Nitsch v. American Cent. Ins. Co.*, reported in 152 N. Y. 635, 46 N. E. 1149. While these decisions are not binding

upon the courts of Pennsylvania, they are, of course, entitled to great respect. It is no doubt, eminently proper to hold companies and corporations, such as insurance companies, to a strict construction of their rights as defined in formal contracts, which are prepared in their own interest and the terms of which the insured, as a rule, has little or no part in determining. This has been the policy of the courts, and has been found by experience to be necessary in order to guard the interests of those who are in many cases ignorant, and in all cases more or less at the mercy of such corporations. The courts of this state have been moved by the same policy, and it may be, and we are inclined to think, that the attitude which has been taken by our own Supreme Court with reference to provisions not identical with, but similar to, those in question, requires us to follow the ruling which has been made in the state of New York."

In the case of *Gosch v. Firemen's Insurance Co.*, 33 Pa. Super. Ct. 496, the court said: "The plaintiffs, then, having paid the premium for the entire term, could the defendant, at its own pleasure, effect a complete extinguishment of the insurance contract, merely by giving notice of its determination to cancel, without at the same time returning or tendering the unearned portion of that premium? Where a contract with mutual undertakings has been entered into by two parties and fully performed by one of them, we may certainly say, speaking generally, that the other party could not successfully invoke the aid of any court in an effort to rescind until he had returned or tendered the return of any valuable thing he had received by reason of the contract. To permit him to retain the benefits and at the same time repudiate the burdens of his own agreement would be highly unconscionable and shocking to our sense of natural justice. It would be out of harmony with some of the fundamental principles on which our entire system of jurisprudence is built. Of course, where the right to cancel has been expressly reserved in the contract itself, then the extent of the right and the conditions upon which it may be exercised must be determined by a reference to the contract, rather than to principles of general law. Turning, then, to the language of the agreement in which the parties have undertaken to state their respective rights and duties, if we find it susceptible of two constructions, one in harmony with, the other in opposition to, those general principles already referred to, a sound discretion would seem to invite us to accept the former and reject the latter, just as, in ascertaining the true meaning of a doubtful clause in a will, the courts incline to that construction which would vest the estate, rather than leave it contingent, which would give the inheritance to the heir rather than to a stranger. Taking up, then, the provision of the policy on this subject, and looking at it as a whole, we may confidently say that it contemplates a complete and effective destruction of the contractual relation at the instance of either party, and that to accomplish this end the party moving must do two distinct and sep-

arate things; the object in view undeniably being that, when the cancellation shall have been completed, both parties will have been restored, as far as possible, to the conditions existing before the contractual relation began. If the destruction of this relation be begun by the assured, he must give notice to the other party and surrender his policy, which proclaims the existence of the relation he would now destroy. If begun by the company, it must also give notice and repay or tender payment of the unearned premium in its hands. The right reserved to each party is but a single one, viz., the right to cancel; and the cancellation contemplated is not a partial, but a complete, one. The obligation imposed on the party moving to cancel is, looking broadly at the entire contract provision, also single, viz., the restoration of the other party, as far as may be, to the situation occupied before the contractual relation began. True, this involves the performance or tender of performance of another act besides the giving of notice; but it does not necessarily follow that such performance or tender may be totally severed in time from, and thus rendered wholly independent of, the giving of the notice. Such a construction of the policy provision, although strongly urged on us by the learned counsel for appellant, is, at best, a doubtful one. More than this he can hardly claim for it, in the light of the fact that it has been deliberately rejected by the courts of last resort of most of our sister states. The argument supporting it, as he agrees, has been stated, as forcibly as it can be, in the dissenting opinion of Chief Justice Parker in *Tisdell v. New Hampshire Fire Ins. Co.*, 155 N. Y. 163, 49 N. E. 664, 40 L. R. A. 765. An examination of this opinion seems to show that its conclusions are reached rather from a critical analysis of some of the language of the policy provision and the order in which its sentences are collated than from a broad view of the entire provision and a consideration of the nature of the object to be accomplished thereby. The following language from the majority opinion clearly indicates that the question must now be considered as settled in that jurisdiction: 'The question presented on this appeal is no longer an open one in this court. It was decided in *Nitsch v. American Central Ins. Co.*, 152 N. Y. 635, 46 N. E. 1149, affirmed in this court without an opinion. In that case, as in this one, the question presented was whether the provision of the New York standard policy of fire insurance relating to the cancellation of a policy at the instance of the company requires that, in addition to giving the five days' notice, the company must return or tender the unearned premium in order to effect a cancellation. The answer was in the affirmative.' In an elaborate discussion of the whole subject, to be found in *Cooley's Briefs of Insurance*, wherein all of the cases from the various jurisdictions are cited and considered, the general rule to be drawn from them is thus stated on page 2801: 'The general rule is that under such a provision, unless waived, the repayment of such proportion of the premium is essential

to a valid cancellation, and notice without such repayment or a tender of the amount is ineffectual. * * * There must be an actual repayment or tender; a mere promise to pay, a request to call for the amount due, or notice that the money is subject to insured's order, being insufficient.' " * * *

In the case of *Chrisman & Sawyer Banking Co. v. Hartford Fire Insurance Co.*, 75 Mo. App. 310, that court said: "In the rescission of a contract by one party, it is a necessary condition precedent to such rescission to place the other party in statu quo—to restore to him whatever may belong to him by reason of bringing the contract to an end. This is the general rule, as applied to all cases of contract. And within this rule it has been repeatedly held that before an insurance company can make an effective cancellation it must return or tender the unearned premium. * * * In this case no attempt was made to do so. No effort was made to ascertain what the unearned premium was, and certainly it will not be pretended that the president of the woolen mill released his claim for that. But it is said that this particular policy provided that the unearned premium was to be returned 'on the surrender of the policy.' And, as the policy was not surrendered, it was not necessary to return the premium. We think the return of the premium and the surrender of the policy, under the terms of the contract, were concurrent acts: that neither could be demanded without the other. But, as defendant was the party seeking cancellation, it was its duty first to have tendered the unearned premium on a surrender of the policy. It then would have done all that the contract required it to do in order to place the assured in statu quo." * * *

In the case of *Hartford Fire Ins. Co. v. McKenzie*, 70 Ill. App. 615, the court for the Second district, in construing an identical contract, said: "Where the company seeks to cancel the contract under such stipulation as is above set out, the insured does not have to tender his policy, in order to entitle him to receive back the unearned premium; but it is for the company desiring cancellation to seek the assured and tender the money to him, and till it does so the cancellation has not been effected." See, also, *Peterson v. Hartford Fire Ins. Co.*, 87 Ill. App. 567; *Hartford Fire Ins. Co. v. Tewes*, 132 Ill. App. 321; *Williamson v. Warfield-Pratt-Howell Co.*, 136 Ill. App. 168; *Mississippi Valley Ins. Co. v. Bermond*, 45 Ill. App. 22; *Hamburg-Bremen Fire Ins. Co. v. Browning*, 102 Va. 890, 48 S. E. 2; 2 *Clement on Insurance*, p. 405. * * *

The authorities holding to the contrary are as follows: *Schwarzchild & Sulzberger Company v. Phoenix Insurance Company of Hartford*, 124 Fed. 52, 59 C. C. A. 572; *Id.* (C. C.) 115 Fed. 653; *El Paso Reduction Company v. Hartford Insurance Company* (C. C.) 121 Fed. 937; *Davidson v. German Insurance Company*, 74 N. J. Law, 487, 65 Atl. 996, 13 L. R. A. (N. S.) 884, 12 Ann. Cas. 1065; *Insurance Company v. Brecheisen*, 50 Ohio St. 542, 35 N. E. 53;

Newark Fire Insurance Company v. Sammons et al., 11 Ill. App. 230.

Such policy being framed by virtue of the laws of New York, and the highest court of that state having interpreted same, such construction should be of most persuasive influence, if not binding with us, especially when supported by the weight of authority. *Equitable Life Assur. Soc. v. Brown*, 213 U. S. 25, 29 Sup. Ct. 404, 53 L. Ed. 682. Hence we hold that the policy was not canceled; no tender having been timely made. * * * Reversed.⁴⁷

XV. Notice and Proofs of Loss ⁴⁸

SERGEANT v. LONDON & LIVERPOOL & GLOBE INS. CO.

(Supreme Court of New York, General Term, Fourth Department, 1895. 85 Hun, 31, 32 N. Y. Supp. 594.)

Action by Adelbert G. Sergeant against the London & Liverpool & Globe Insurance Company on a fire insurance policy. From a judgment dismissing the complaint, and from an order denying a motion for a new trial, made on the minutes, plaintiff appeals.

PER CURIAM.⁴⁹ On the trial the plaintiff was nonsuited. The principal question involved upon this appeal is as to the validity of such nonsuit. The policy which formed a basis for this action, among others, contained the following provisions: "If fire occur, the insured shall give immediate notice of any loss thereby in writing to this company, and within sixty days after the fire, unless such time is extended in writing by this company, shall render a statement to this company, signed and sworn to by said insured, stating the knowledge and belief of the insured as to the time and origin of the fire; the interest of the insured and all others in the property; the cash value of each item thereof, and the amount of loss thereon; all incumbrances thereon; all other insurance, whether valid or not, covering any of said property, and a copy of the descriptions and schedules

⁴⁷ Contra: *Davidson v. German Ins. Co.*, 74 N. J. Law, 487, 65 Atl. 996, 13 L. R. A. (N. S.) 884, 12 Ann. Cas. 1065 (1907).

The provision as to cancellation is substantially the same in the standard form of policy prescribed in New York, Connecticut, Louisiana, Michigan, Missouri, New Jersey, North Carolina, North Dakota, Pennsylvania, and Rhode Island. The Wisconsin form provides that, if the hazard is increased solely by act of God, the company may not cancel except on sixty days' notice. The forms used in Maine, Massachusetts, Minnesota, New Hampshire, and South Dakota, provide that cancellation by the company may be made by giving notice and "tendering the ratable proportion of the premium."

⁴⁸ For discussion of principles, see Vance on Insurance, §§ 184-189. See, also, Cooley, *Briefs on the Law of Insurance*, vol. 4, p. 3347 et seq.

⁴⁹ Part of the opinion is omitted.

in all policies; any changes in the title, use, occupation, location, possession, or exposures of said property since the issuing of this policy; by whom and for what purpose any building herein described, and the several parts thereof, were occupied at the time of fire.
* * *

That the property included in the policy in question was destroyed by fire on August 27, 1892, and that proofs of loss were not furnished until November 26th of that year, are undisputed facts in the case. Thus, it conclusively appears that the condition of the policy requiring the plaintiff to furnish proofs of loss within 60 days after the fire was not performed or complied with; nor is it pretended that the time was extended in writing by the defendant. The furnishing of proofs of loss as required by the policy was a condition precedent to the plaintiff's right of recovery. *Underwood v. Insurance Co.*, 57 N. Y. 500; *Blossom v. Insurance Co.*, 64 N. Y. 162; *O'Brien v. Insurance Co.*, 63 N. Y. 111; *McDermott v. Insurance Co.*, 44 N. Y. Super. Ct. R. 221; *Bell v. Insurance Co.*, 19 Hun, 238. And the nonperformance of this condition constitutes a complete defense to a recovery upon such a policy. *Quinlan v. Insurance Co.*, 133 N. Y. 356, 362, 31 N. E. 31, 28 Am. St. Rep. 645.

These authorities seem to be decisive of the question before us, unless this provision in the policy can be held to have been waived by the defendant. We have carefully examined the evidence bearing upon that question, and regard it as insufficient to raise any question of waiver of this condition in the policy. Without discussing the other questions upon which it is claimed that the nonsuit might be sustained, we regard the one already considered as sufficient, and hence do not examine the other questions presented for our consideration.

We have also examined the other exceptions to which our attention has been called by the appellant, but find none that would authorize us to disturb the judgment. Judgment and order affirmed, with costs.⁵⁰

MASON v. ST. PAUL FIRE & MARINE INS. CO.

(Supreme Court of Minnesota, 1901. 82 Minn. 336, 85 N. W. 13, 83 Am. St. Rep. 433.)

Action by George A. Mason against the St. Paul Fire & Marine Insurance Company. Judgment for plaintiff. From an order denying a new trial, defendant appeals.

⁵⁰ The provision as to notice and proofs of loss is substantially the same in the standard form of policy prescribed in New York, Connecticut, Louisiana, Michigan, Missouri, New Jersey, North Carolina, North Dakota, Pennsylvania, Rhode Island, South Dakota, and Wisconsin. In Maine, Massachusetts, Minnesota, and New Hampshire, the provision is in effect that in case of loss or damage a statement "shall be forthwith rendered to the company," setting forth, etc.

BROWN, J.⁵¹ This action is one to recover upon a fire insurance policy, issued by defendant to plaintiff and one Mabey, covering a steam yacht on the waters of Lake Minnetonka. Plaintiff had a verdict in the court below, and defendant appeals from an order denying a new trial.

The facts, briefly stated, are as follows: Plaintiff and Mabey jointly owned the yacht in question, and insured it in defendant company for the sum of \$1,000, the policy of insurance being in the form of the Minnesota Standard Policy, and dated and issued July 14, 1899. On August 22d following the yacht was totally destroyed by fire, as alleged in the complaint. Proofs of loss were served upon defendant on October 10, 1899. Defendant refused to settle the loss, and this action followed.

There are several assignments of error, but the main question for consideration is as to the effect of the failure on the part of the insured to make and serve on the company proofs of loss within the time prescribed by the terms of the policy, viz. forthwith, or, as we have heretofore held, within a reasonable time after the loss. The trial court charged the jury that plaintiff had failed to show a compliance with such provision, but that it was not material; that the failure did not invalidate the policy, nor prevent a recovery for an actual loss thereunder,—the theory of the court evidently being that as the policy contains no terms of forfeiture, and being silent as to the effect of a failure in that respect, a provision rendering the policy unenforceable, and the rights of the insured forfeited, could not be read into it by judicial construction.

We have given the matter very careful consideration, and reach the conclusion that the learned trial judge correctly disposed of the case. His charge to the jury was in line with the general trend of the authorities on the subject, and in full accord with the general principles of law on the subject of forfeitures. The question was not necessarily involved or considered in *Rines v. Insurance Co.*, 78 Minn. 46, 80 N. W. 839, nor in *Fletcher v. Insurance Co.*, 79 Minn. 337, 82 N. W. 647, and is now before the court for the first time.

On the subject of proofs of loss, the policy provides as follows: "In case of any loss or damage under this policy, a statement in writing, signed and sworn to by the insured, shall be forthwith rendered to the company, setting forth the value of the property insured," etc. It further provides for the payment of any such loss within 60 days after proofs of loss are served. It contains several provisions, a violation or failure of compliance with which on the part of the insured renders it wholly void, but contains no provision or stipulation giving any such effect to a failure to serve proper proofs of loss within the time therein provided. Nor is there any general clause in the policy to that effect. The submission to arbitration as to the amount of loss,

⁵¹ Part of the opinion is omitted.

where the parties do not agree upon that question, is made a condition precedent to the right of action on the policy. The policy also provides that an action thereon must be brought within two years from the date of the loss, but contains no provision making the service of proofs of loss within the time specified fatal to the rights of the insured, or a condition precedent to the liability of the company.

It is very generally held by the authorities, in cases where this question has been presented, that unless the policy provides a forfeiture, or makes the service of proofs of loss within the time specified therein a condition precedent to the liability of the company, the time within which such proofs are required to be furnished is not of the essence of the contract. Where no forfeiture is provided by the terms of the contract, and the service of proofs of loss within the specified time is not made a condition precedent to the liability of the company, the effect of such failure is simply to postpone the day of payment. No liability attaches to the company, however, until such proofs are furnished; but unless otherwise provided, expressly or by fair implication, it is not important that the proofs be not in fact served within the time stated in the policy. 2 May, Ins. (4th Ed.) p. 1097, note a; *Association v. Evans*, 102 Pa. 281; *Carpenter v. Insurance Co.*, 52 Hun, 249, 4 N. Y. Supp. 925; *Vangindertaelen v. Insurance Co.*, 82 Wis. 112, 51 N. W. 1122, 33 Am. St. Rep. 29; *Rynalski v. Insurance Co.*, 96 Mich. 395, 55 N. W. 981; *Assurance Co. v. Hanna*, 60 Neb. 29, 82 N. W. 97; *Steele v. Insurance Co.*, 93 Mich. 81, 53 N. W. 514, 18 L. R. A. 85; *Insurance Co. v. Downs*, 90 Ky. 236, 13 S. W. 882; *Insurance Co. v. Mattingly*, 77 Tex. 162, 13 S. W. 1016; *Kahnweiler v. Insurance Co. (C. C.)* 57 Fed. 562; *Insurance Co. v. Knight*, 111 Ga. 622, 36 S. E. 821, 52 L. R. A. 70, 78 Am. St. Rep. 216.

It was held by this court in *Bowlin v. Insurance Co.*, 36 Minn. 433, 31 N. W. 859; *Shapiro v. Western Home Ins. Co.*, 51 Minn. 239, 53 N. W. 463; *Same v. St. Paul Fire & Marine Ins. Co.*, 61 Minn. 135, 63 N. W. 614; and *Ermentrout v. Insurance Co.*, 63 Minn. 305, 65 N. W. 635, 30 L. R. A. 346, 56 Am. St. Rep. 481,—that a failure of strict compliance with similar provisions in the policies there under consideration was a condition precedent to the company's liability, but such policies contained express provisions to that effect, and the decisions there made were based upon that fact. The cases are inapplicable, and not in point. Though the policy here under consideration is identical with those in *Rines v. Insurance Co.* and *Fletcher v. Insurance Co.*, *supra*, the precise question now before the court was not there presented. It was suggested in respondent's brief in the latter case, but was not argued by appellant. It was there assumed that compliance with the policy was essential to charge the company with liability, and the only questions decided with respect to this immediate subject were that "forthwith" should be construed to mean within a reasonable time, and that what would constitute a reasonable

time was a question of fact to be determined from the evidence and circumstances of each case.

There is much force in the contention of counsel for appellant that the insured should be held to a strict compliance with this provision of the policy. There is every reason why prompt notice should be given the insurance company. Some of them are suggested in *Fletcher v. Insurance Co.*, *supra*. Immediate notice, or notice within a reasonable time, will afford the company an opportunity to make investigation into the cause of the fire, which may be essential and necessary to the protection of its interests, and to which it is justly entitled. It will afford the company an opportunity to detect fraud, if any be connected with the loss, to ascertain the nature and extent of the loss, and make such other investigation as would be fruitless after long delay. But the policy before us contains no provisions which will justify a holding that a strict compliance therewith in this respect is essential, and the matter must be referred to the legislature to consider and adjust by proper amendment to the standard policy law, if such amendment shall be deemed just and equitable. * * * Affirmed.⁵²

⁵² See, also, *Welch v. Fire Association*, 120 Wis. 456, 98 N. W. 227 (1904).

TERMS OF THE LIFE POLICY

I. Designation of Beneficiary ¹

LYONS v. YEREX.

(Supreme Court of Michigan, 1894. 100 Mich. 214, 58 N. W. 1112, 43 Am. St. Rep. 452.)

Action by James H. Lyons against David V. Yerex to recover proceeds of insurance on his father's life, held by defendant, because claimed by the widow. From a judgment awarding the fund to the widow, plaintiff brings error.

McGRATH, C. J. On the 30th day of September there was issued to Harrison H. Lyons a certificate of membership in the Northwestern Masonic Aid Association, a mutual benefit or co-operative insurance company, which was made payable "to the heirs at law of the said Harrison H. Lyons." The insured died intestate, leaving a widow and one son. By agreement the money was paid over to defendant, who paid one-half thereof to plaintiff, who now sues to recover the balance, claiming that the widow is not entitled to share in the proceeds of the policy.

Under our statute the widow takes a share of the personal property of her husband as distributed, and not as dowress, and is an heir as to such property. In *Hascall v. Cox*, 49 Mich. 435, 440, 13 N. W. 807, 809, it is said: "'Heirs' is a technical word, and when it is made use of in any legal instrument there is a presumption, more or less strong, according to the circumstances, that it is employed in a technical sense. But in common speech the word is frequently used to indicate those who come in any manner to the ownership of any property by reason of the death of an owner, and may then include next of kin and legatees as well as those who take by descent. And in wills, which are often very informal instruments, and drawn without legal assistance, the word is sometimes employed with quite as little regard to the technical sense."

In the present case we are not considering the use of the word in a will, but in a contract of insurance, in which the insured has used the word to designate the beneficiaries. In determining the signification of words used in any case we are to consider all the surrounding circumstances. The original purpose of such contracts on the part of the insured is to make provision for dependants. It is most prob-

¹ For discussion of principles, see Vance on Insurance, § 193. See, also, Cooley, Briefs on the Law of Insurance, vol. 4, p. 3720.

able that the insured was actuated by the motive which ordinarily prompts men to take out insurance. The common acceptation of the term "heir" has already been referred to. The statute makes the widow an heir as to personal property, and the wife is within the class of persons protected and sought to be protected by this class of insurance.

In *Tillman v. Davis*, 95 N. Y. 17, 47 Am. Rep. 1, cited by plaintiff, the court was construing a will in which the testatrix was dealing with both real and personal property, and the court held that the word "heirs" was used to designate blood relations. In *Griswold v. Sawyer*, 125 N. Y. 411, 26 N. E. 464, it was held that the term "legal representatives," as used in a life insurance policy, includes the widow. The opinion was written by the same justice who wrote *Tillman v. Davis*. The court say: "Mr. Griswold was not a lawyer, and hence cannot be supposed to have used these words in their strict, technical legal sense, but it is more reasonable to suppose that he used them in the general sense in which they are frequently used and generally understood by laymen."

In *Kaiser v. Kaiser*, 13 Daly (N. Y.) 522, it was held that the words "legal heirs," used in a certificate of membership in a mutual insurance association, include the widow. Bookstaver, J., says: "We think all this inconsistent with the theory that he used the phrase 'legal heirs' in its ordinary acceptation, but we think that he intended thereby to designate his wife and children, if he should leave any; and this is the meaning often attached to the phrase by the unlearned, especially when only personal property is concerned."

Gauch v. Insurance Co., 88 Ill. 251, 30 Am. Rep. 554, is also cited, but the court there held that under the statute the widow did not take an interest in her husband's personal property as a distributee but as dowress. In *Lawwill v. Lawwill*, 29 Ill. App. 643, decedent held a policy in the Masonic Benefit Association, payable to his legal heirs. He died, leaving a widow, but no children. The statute provided that, in case the husband died without issue, the widow should take all the personal property. The court held that the widow was within the contingencies specified in the statute, and was the heir at law to his estate, and that the word "heirs," when uncontrolled by the context, must be construed to mean the persons designated by the statute as such in case of intestacy. See, also, *Association v. Hoffman*, 110 Ill. 603, and *Alexander v. Association*, 126 Ill. 558, 18 N. E. 556, 2 L. R. A. 161.

In *Johnson v. Supreme Lodge*, 53 Ark. 255, 13 S. W. 794, 8 L. R. A. 732, Battle, J., says: "Suffice it to say that the weight of authority holds that the word 'heir,' when used in any instrument to designate the persons to whom personal property is thereby transferred, given, or bequeathed, and the context does not explain it, means those who would, under the statute of distributions, be entitled to the personal

estate of the persons of whom they are mentioned as heirs, in the event of death and insolvency. * * * In many states where the widow is entitled to take under the statute of distribution she is held to be heir of her deceased husband as to his personal estate, but it is different in this state. * * * It is true that section 2592, Mansf. Dig., provides: 'If a husband die, leaving a widow and no children, such widow shall be endowed of one-half of the real estate of which such husband died seised, and one-half of the personal estate, absolutely in her own right.' But she takes the one-half of the personal estate as dower, absolutely and independent of creditors and not as a distributive share."

In *Bailey v. Bailey*, 25 Mich. 185; *Barnett v. Powers*, 40 Mich. 317; *Richardson v. Martin*, 55 N. H. 45; *Ivins' Appeal*, 106 Pa. 176, 51 Am. Rep. 516; *Luce v. Dunham*, 69 N. Y. 36; and *Dodge's Appeal*, 106 Pa. 216, 51 Am. Rep. 519,—the property with reference to which the word was used was real estate. In the latter case, Sterrett, J., in the opinion, says: "If the fund for distribution was personalty, the widow would perhaps be entitled to participate therein."

In *De Beauvoir v. De Beauvoir*, 3 H. L. Cas. 537, the property devised was both real and personal. The court says: "On the face of the will it was the intention of the testator to make the two funds a blended property, and to give them the character of real estate, and to make both the properties go together."

Nibl. Mut. Ben. Soc. § 247, says: "At common law one's heirs are the persons who would inherit his real estate by right of blood. The statutes of adoption and those of descent have, in every state, to a greater or less degree, enlarged the meaning of the word, so that it may include persons not of the blood of the intestate. At common law the word has no reference to the distribution of any personalty, and this rule has not been disturbed by statute in some states. In those states, therefore, where this common-law rule obtains, the word 'heirs,' in a statute setting forth a class of persons who may take the fund, or in a certificate designating the persons who shall take the fund on the member's death, must be taken to mean the person or persons to whom the real estate of the member will pass under the statutes of descent, whether such person or persons be akin to him or not. In most states, however, the statutes provide not only who shall inherit the realty of an intestate, but also who shall be the heirs of his personal property."

The same author, at section 248, says: "Nothing is more natural, therefore, than to regard the heirs of the intestate's personal property as the beneficiaries designated in the contract of insurance as 'my heirs.'" See *Houghton v. Kendall*, 7 Allen (Mass.) 72; *White v. Stanfield*, 146 Mass. 424, 15 N. E. 919; *Addison v. Association*, 144 Mass. 591, 12 N. E. 407; *Collier v. Collier*, 3 Ohio St. 374; *Eby's Appeal*, 84 Pa. 241; *Freeman v. Knight*, 37 N. C. 72; *Insurance Co. v. Miller*, 13 Bush. (Ky.) 489; *Wilburn v. Wilburn*, 83 Ind. 55; *Gos-*

ling v. Caldwell, 1 Lea (Tenn.) 454, 27 Am. Rep. 774; Ward v. Saunders, 3 Sneed (Tenn.) 387; Croom v. Herring, 11 N. C. 393.

Under the circumstances, we think it must be presumed that by the use of the words "my heirs" the insured intended to include those designated by the statute as such, and to whom the law would give that class of property in case of intestacy. The judgment must therefore be affirmed.

II. Suicide—When Not Excepted in the Policy ²

SEILER v. ECONOMIC LIFE ASS'N OF CLINTON.

(Supreme Court of Iowa, 1898. 105 Iowa, 87, 74 N. W. 941, 43 L. R. A. 537.)

Plaintiffs sue to recover insurance upon the life of one Joseph Seiler, deceased. Two actions were brought, each upon a different policy. The actions were consolidated in the trial court. Defendant made one answer to the two claims, as combined. There was a trial to jury, verdict and judgment for plaintiffs, and defendant appeals.

WATERMAN, J.³ The undisputed facts in the case are that the defendant company issued to one Joseph Seiler the two policies in suit, numbered, respectively, 17,146 and 17,147. By these policies the life of said Seiler was insured for the benefit of the plaintiffs in the sum of \$2,000; each policy being for the sum of \$1,000. Both of these policies were issued upon a single application. This application was signed, "Joseph Seiler;" and a copy thereof, with the exception that the signature was omitted, and in its place appeared the word "Signed," was attached to policy No. 17,146. No copy or purported copy of the application was attached to policy No. 17,147, but there was an indorsement thereon in these words: "For copy of application, see policy No. 17,146, issued to same party." The policies were taken out on the 31st day of August, 1895; and, on the 7th day of October following, Seiler committed suicide. The policies contained no provision in relation to suicide, but there was this clause in the application, "I also warrant and agree that I will not die by my own act, whether sane or insane, during the period of three years following the date of issue of the policy for which application is hereby made."

* * *

The defense of suicide was set up in two forms. In one, as we have said, it went to the jury. The paragraph of the answer to which the demurrer was sustained was as follows: "That the said Joseph Seiler

² For discussion of principles, see Vance on Insurance, §§ 195, 196. See, also, Cooley, Briefs on the Law of Insurance, vol. 4, p. 3224.

³ Part of the opinion is omitted.

on or about the 7th day of October, 1895, and while in sane mental condition, and able to understand the moral character and consequences of his act, committed suicide, and intentionally and purposely killed himself, by shooting. The question thus presented by the ruling on the demurrer is: If a policy of insurance on life, containing no stipulation as to suicide, is taken out in good faith by the assured, will it be avoided, as against a beneficiary named therein, by the fact that the assured thereafter, while sane, deliberately and purposely took his own life? The authorities are not many on the subject, and they are not seriously in conflict. While there are a number of cases in which something has been said upon this matter in the way of dicta, there is but one in which it has been expressly decided that the suicide of the assured, if sane, will avoid a policy that contains no provision of forfeiture in such case; and that is *Ritter v. Insurance Co.*, 169 U. S. 139, 18 Sup. Ct. 300, 42 L. Ed. 693, decided at the October term of the federal supreme court. The opinion in this case in the circuit court of appeals appears in 17 C. C. A. 537, and 70 Fed. 954, 42 L. R. A. 583. This last citation is given because we shall have occasion to refer to this opinion in the course of what we shall say. It was held in the Ritter Case that there could be no recovery on a policy of insurance by the executor of one who, while sane, intentionally took his own life, even though the policy contained no clause of forfeiture because of such act. We think that case is readily distinguishable from the case at bar. In the Ritter Case the action was brought by the personal representative of the assured, whose claim had to be made through the wrongdoer, while here the suit is instituted by beneficiaries named in the policy, and who claim in their own right.

An investigation will disclose that the distinction we make is material, and supported by authority. In *Moore v. Woolsey*, 4 El. & Bl. 243, the policy contained a stipulation avoiding it, as far as regarded the executors and administrators of the assured, if he died by his own hand, but leaving it in force to the extent of any interest acquired by a third person. The plea was that the assured had committed suicide. Replication that one Kettle, before the death of the assured, had acquired by assignment an interest in the policy. Upon these issues, Lord Campbell, delivering the opinion, said: "If a man insures his life for a year, and commits suicide within the year, his executors cannot recover upon the policy, as the owner of a ship, who insures her for a year, cannot recover upon the policy if within the year he cause her to be sunk. A stipulation that in either case upon such an event the policy would give a right of action would be void." This is the language quoted in the Ritter Case, and it was obiter only. But Lord Campbell said something more, and something not only pertinent to the issues before him, but that has direct application to the matter we are considering. He continues: "But, where a man insures his own life, we can discover no illegality in a stipulation that if the policy

should afterwards be assigned, bona fide, for a valuable consideration, or a lien upon it should afterwards be acquired, bona fide, for a valuable consideration, it might be enforced for the benefit of others, whatever may be the means of his death. * * * The supposed inducement to commit suicide under such circumstances cannot vitiate the condition, more than the inducement which the lessor may be supposed to have to commit murder should render invalid a beneficial lease granted for lives. When we are called upon to nullify a contract on the ground of public policy, we must take care that we do not lay down a rule which may interfere with the innocent and useful transactions of mankind."

If public policy does not stand in the way of a recovery by an assignee, we can discern no reason why it should in the case of a beneficiary named in the contract. It may be said that the assignee spoken of is one whose claim rests upon a consideration paid. To this we would say that the claim of the beneficiary is also based upon a consideration paid by the assured. If it should further be said that public policy does not bar a recovery by the assignee because the interests of creditors furnish little or no motive for the self-destruction of the assured, our answer would be this: The motives for suicide are manifold and varied. An inquiry as to what inducement is most likely to impel one to the act is profitless, for any rule of law that would prevent a recovery by these plaintiffs would operate in like manner against a mere creditor, if he were the beneficiary named.

And, further, we might call attention to the Ritter Case, in which the assured admittedly sacrificed his life for the benefit of his creditors. In the opinion in the Ritter Case in the circuit court of appeals it is said: "In the cases brought to our attention where suicide during sanity, by the person whose life was insured, was held not to be a valid defense, the policy was issued for the benefit of some other person, or an independent interest, by assignment or otherwise, had been acquired by a third person." Here is the distinction plainly made. So, also, in the opinion of Mr. Justice Harlan on appeal, we think the same idea is expressed. In commenting on an expression used in another case, he says: "This observation was irrelevant to the case before the court, and cannot be regarded as determining the point in judgment. If it was meant there could be a recovery by the personal representative, * * * we cannot concur in that view."

Another and a convincing reason for thinking that the doctrine announced in the Ritter Case was not intended to go further than to deny a right of recovery to the personal representatives of the assured is that no one of the several cases in which beneficiaries named in the contract have been held entitled to recover was mentioned in that opinion. We shall now refer to these cases:

Fitch v. Insurance Co., 59 N. Y. 559, 17 Am. Rep. 372, is the first. Suit was brought by the widow, to whom the policy was payable. The contract contained no clause avoiding it in case of suicide by the as-

sured. One defense tendered was that the assured took his own life. Evidence to sustain it was excluded by the trial court. In affirming this ruling the court of appeals says: "The policy contained no stipulation that it should be void in case of the death of the insured by suicide. It was not taken out for the benefit of Fitch, but of his wife and children. Although they were bound by his representations, and any fraud he may have committed in taking out the policy, the policy having been obtained through his agency, yet they were not bound by any acts or declarations done or made by him after the issue of the policy, unless such acts were in violation of some condition of the policy."

In *Darrow v. Society*, 116 N. Y. 537, 22 N. E. 1093, 6 L. R. A. 495, 15 Am. St. Rep. 430, the plaintiff was the beneficiary under the contract. The assured committed suicide. There was a provision in the policy that it should "be void if the member herein shall die in consequence of a duel, or by the hands of justice, or in violation of, or an attempt to violate, any criminal law of the United States, or of any state or country in which the member may be." Held that, suicide not being a crime in New York, the condition of the policy was not violated, and the plaintiff could recover.

Kerr v. Association, 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631, is a case similar in principle to the last. The same holding in favor of a beneficiary has been made by this court in *Goodwin v. Society*, supra [97 Iowa, 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411]. The policy sued upon provided for its forfeiture in the event of suicide within two years, and by its express terms it was incontestable after that time. After the lapse of that period the assured took his own life. The policy was issued to the wife. In an action by her, we held she could recover. Now, if suicide is a risk that the company is forbidden, by considerations of public policy, to take, it could not have been held as within the agreement not to contest; for, if a contract to insure as against the risk of suicide is void, the waiver here must have been invalid, and the defense should have been sustained. The question was brought directly to the attention of the court in argument, as appears from the language of the opinion.

These are the cases which we have been able to find. We wish now to add a few words on principle, by way of emphasis of a thought already expressed. It is not the wrongdoer who makes claim here, nor any representative whose rights are to be measured by those of the wrongdoer, but persons who acquired an interest at the time the policy was taken out, and who are not in any way responsible for the loss under it. The defendant might well have guarded against this contingency in its contract. Not having done so, we think it is now in no position to complain. * * * Affirmed.⁴

⁴ Accord: *Kerr v. Minnesota Mut. Ben. Ass'n*, 39 Minn. 174, 39 N. W. 312, 12 Am. St. Rep. 631 (1888). *Patterson v. Natural Prem. Mut. Life Ins. Co.*, 100 Wis. 118, 75 N. W. 980, 42 L. R. A. 253, 69 Am. St. Rep. 899 (1898).

III. Suicide—When Excepted in the Policy ⁵

BIGELOW v. BERKSHIRE LIFE INS. CO.

(Supreme Court of United States, 1876. 93 U. S. 284, 23 L. Ed. 918.)

Error to the Circuit Court of the United States for the Northern District of Illinois.

This is an action on two policies issued by the defendant on the life of Henry W. Bigelow. Each contained a condition in avoidance, if the insured should die by suicide, sane or insane; and in such case the company agreed to pay to the party in interest the surrender value of the policy at the time of the death of Bigelow. The defendant pleaded that Bigelow died from the effects of a pistol-wound inflicted upon his person by his own hand, and that he intended by this means to destroy his life. To this the plaintiffs replied, that Bigelow, at the time when he inflicted the pistol-wound upon his person by his own hand, was of unsound mind, and wholly unconscious of the act. A demurrer to this replication was sustained by the court below, and the plaintiffs bring the case here for review.

Mr. Justice DAVIS delivered the opinion of the court.

There has been a great diversity of judicial opinion as to whether self-destruction by a man, in a fit of insanity, is within the condition of a life policy, where the words of exemption are that the insured "shall commit suicide," or "shall die by his own hand." But since the decision in *Life Ins. Co. v. Terry*, 15 Wall. 580, 21 L. Ed. 236, the question is no longer an open one in this court. In that case the words avoiding the policy were, "shall die by his own hand"; and we held that they referred to an act of criminal self-destruction, and did not apply to an insane person who took his own life. But the insurers in this case have gone further, and sought to avoid altogether this class of risks. If they have succeeded in doing so, it is our duty to give effect to the contract; as neither the policy of the law nor sound morals forbid them to make it. If they are at liberty to stipulate against hazardous occupations, unhealthy climates, or death by the hands of the law, or in consequence of injuries received when intoxicated, surely it is competent for them to stipulate against intentional self-destruction, whether it be the voluntary act of an accountable moral agent or not. It is not perceived why they cannot limit their liability, if the assured is in proper language told of the extent of the limitation, and it is not against public policy. The words of this stipulation, "shall die by suicide (sane or insane)," must receive a

⁵ For discussion of principles, see Vance on Insurance, §§ 197-199. See, also, Cooley, Briefs on the Law of Insurance, vol. 4, p. 3224.

reasonable construction. If they be taken in a strictly literal sense, their meaning might admit of discussion; but it is obvious that they were not so used. "Shall die by his own hand, sane or insane," is, doubtless, a more accurate mode of expression; but it does not more clearly declare the intention of the parties.

Besides, the authorities uniformly treat the terms "suicide" and "dying by one's own hand," in policies of life insurance, as synonymous, and the popular understanding accords with this interpretation. Chief Justice Tindall, in *Borradaile v. Hunter*, 5 Mann. & Gr. 668, says, "The expression, 'dying by his own hand,' is, in fact, no more than the translation into English of the word of Latin origin, 'suicide.'" Life insurance companies indiscriminately use either phrase, as conveying the same idea. If the words, "shall commit suicide," standing alone in a policy, import self-murder, so do the words, "shall die by his own hand." Either mode of expression, when accompanied by qualifying words, must receive the same construction. This being so, there is no difficulty in defining the sense in which the language of this condition should be received. Felonious suicide was not alone in the contemplation of the parties. If it had been, there was no necessity of adding anything to the general words, which had been construed by many courts of high authority as not denoting self-destruction by an insane man. Such a man could not commit felony; but, conscious of the physical nature, although not of the criminality, of the act, he could take his own life, with a settled purpose to do so.

As the line between sanity and insanity is often shadowy and difficult to define, this company thought proper to take the subject from the domain of controversy, and by express stipulation preclude all liability by reason of the death of the insured by his own act, whether he was at the time a responsible moral agent or not. Nothing can be clearer than that the words, "sane or insane," were introduced for the purpose of excepting from the operation of the policy any intended self-destruction, whether the insured was of sound mind or in a state of insanity. These words have a precise, definite, well-understood meaning. No one could be misled by them; nor could an expansion of this language more clearly express the intention of the parties. In the popular, as well as the legal, sense, suicide means, as we have seen, the death of a party by his own voluntary act; and this condition, based, as it is, on the construction of this language, informed the holder of the policy, that, if he purposely destroyed his own life, the company would be relieved from liability.

It is unnecessary to discuss the various phases of insanity, in order to determine whether a state of circumstances might not possibly arise which would defeat the condition. It will be time to decide that question when such a case is presented. For the purposes of this suit, it is enough to say, that the policy was rendered void, if the insured was conscious of the physical nature of his act, and intended by it to cause

his death, although, at the time, he was incapable of judging between right and wrong, and of understanding the moral consequences of what he was doing.

Insurance companies have only recently inserted in the provisos to their policies words of limitation corresponding to those used in this case. There has been, therefore, but little occasion for courts to pass upon them. But the direct question presented here was before the Supreme Court of Wisconsin in 1874, in *Pierce v. Travelers' Life Insurance Company*, 34 Wis. 389, and received the same solution we have given it. More words were there used than are contained in this proviso; but the effect is the same as if they had been omitted. To say that the company will not be liable if the insured shall die by "suicide, felonious or otherwise," is the same as declaring its non-liability, if he shall die by "suicide, sane or insane." They are equivalent phrases. Neither the reasoning nor the opinion of that court is at all affected by the introduction of words which are not common to both policies.

It remains to be seen whether the court below erred in sustaining the demurrer. The replication concedes, in effect, all that is alleged in the plea; but avers that the insured at the time "was of unsound mind, and wholly unconscious of the act." These words are identical with those in the replication to the plea in *Breasted v. Farmers' Loan & Trust Company*, 4 Hill (N. Y.) 73; and Judge Nelson treated them as an averment that the assured was insane when he destroyed his life. They can be construed in no other way. If the insured had perished by the accidental discharge of the pistol, the replication would have traversed the plea. Instead of this, it confesses that he intentionally took his own life; and it attempts to avoid the bar by setting up a state of insanity. The phrase, "wholly unconscious of the act," refers to the real nature and character of the act as a crime, and not to the mere act itself. Bigelow knew that he was taking his own life, and showed sufficient intelligence to employ a loaded pistol to accomplish his purpose; but he was unconscious of the great crime he was committing. His darkened mind did not enable him to see or appreciate the moral character of his act, but still left him capacity enough to understand its physical nature and consequences.

In the view we take of the case, enough has been said to show that the court did not err in holding that the replication was bad. Judgment affirmed.⁶

⁶ See, also, *Scherar v. Prudential Ins. Co.*, 63 Neb. 530, 88 N. W. 687, 56 L. R. A. 611 (1902) in which the policy provided that if the insured should commit suicide within three years from the date of the policy the liability of the company should be limited to the amount of premiums paid.

IV. Death in Violation of Law⁷

COLLINS v. METROPOLITAN LIFE INS. CO.

(Supreme Court of Illinois, 1907. 232 Ill. 37, 83 N. E. 542, 14 L. R. A. [N. S.] 356, 122 Am. St. Rep. 54, 13 Ann. Cas. 129.)

Action by Hugh Collins, as executor of the estate of Robert Kilpatrick, deceased, against the Metropolitan Life Insurance Company, on a life insurance policy issued by that company on the life of Robert Kilpatrick. The policy provided that it should be incontestable after two years except for the nonpayment of premiums or for fraud. Two defenses are set up in the pleas of the insurance company: First, that Kilpatrick was indicted, tried, convicted, and executed for murder; second, that in 1903 the plaintiff commenced a suit in the court of common pleas of Philadelphia against the insurance company on the same policy declared on in this suit; that a rule was entered upon the defendant by that court to file its affidavit of defense; that the defendant filed its affidavit, setting up the indictment, trial, conviction, and execution of Kilpatrick on the charge of murder, and that it was adjudged and decided by said court that on the ground of public policy, the insured having been executed for a crime, the plaintiff could not recover; that the plaintiff took an appeal to the superior court of Pennsylvania, and upon such appeal the superior court decided that the facts alleged in the affidavit constituted a good defense to said suit, and dismissed the plaintiff's appeal at the cost of the plaintiff, but without prejudice. The plea setting up the latter defense contained averments of facts showing jurisdiction of the court over the parties and subject-matter. The plaintiff below demurred to the pleas. The demurrer was overruled, and, the plaintiff electing to abide his demurrer, the court gave judgment against him for costs. Upon an appeal to the Appellate Court for the First District, the judgment of the circuit court of Cook county was affirmed. The case comes to this court on a certificate of importance, the amount involved being less than \$1,000.⁸

VICKERS, J. Whether the legal execution of the assured for a crime committed by him constitutes a defense to an action by his legal representative on a life insurance policy is a question of first impression in this state. Where this defense has been sustained, it is generally upon the ground that it is contrary to public policy to permit a recovery where the death is in consequence of a violation of the law.

⁷ For discussion of principles, see Vance on Insurance, §§ 200, 201. See, also, Cooley, Briefs on the Law of Insurance, vol. 4, pp. 3143-3152.

⁸ The statement of facts is rewritten.

This is the basis of the decision of this case by the Appellate Court, and is the main reason urged here in support of the judgment below.

It is said by the defendant in error that to permit a recovery on this policy would be contrary to the public policy of this state, as it would tend to remove a restraint thrown around persons who are tempted to commit crimes. The argument rests upon the same grounds that were urged centuries ago in support of the now obsolete doctrine of attainder and corruption of blood. In the earlier history of the common law various consequences other than the punishment of the offender followed conviction for felony, and in some instances the causing of a death by mere misadventure or negligence was visited with certain forfeitures and penalties. Without attempting historical accuracy, the law of England provided that all the property, real and personal, of one attainted should be forfeited and his blood so corrupted that nothing could pass by inheritance to, from, or through him. He could not sue, except to have his attainder reversed. Thus the wife, children, and collateral relations of the attainted person suffered with him. As said by Bishop: "When the tree fell, it brought down all its branches." 1 Bishop on Crim. Law, § 968. As further illustrating the rigor of the old English law, it was provided that, if a man be indicted for felony and flees, he forfeits by flight his goods, and "he that committeth homicide by misadventure shall forfeit his goods; and so shall he which doth kill a man in his own defense forfeit his goods; and likewise he that killeth himself and is *felo de se* shall forfeit his goods; and he that being indicted to felony shall stand mute and not answer directly, or challenge peremptorily above twenty persons, shall forfeit his goods."

These ancient doctrines, whether resting upon grounds of public policy or upon the other reason which is sometimes put forth, that the government is entitled to the goods of the felon as compensation for the injury done and the expense occasioned, have failed to satisfy the conscience and judgment of courts of later periods in England, and have never had a potential existence in American jurisprudence. The Constitution of the United States, art. 3, § 3, provides that "no attainder of treason shall work corruption of blood or forfeiture except during the life of the person attainted" and by an act of Congress passed in 1790 (Act April 30, 1790, c. 9, 1 Stat. 112) all corruption of blood and forfeitures, whether for treason or felony, as to convictions under the federal law, were abolished. This doctrine never had any existence in Illinois, even in the modified form which seems to be recognized in the federal Constitution. In all the Constitutions adopted in this state a provision similar to the one found in section 11 of article 2 of the Constitution of 1870 is to be found. Thus, the Constitution of 1818 provided: "No *ex post facto* law, nor any other law impairing the validity of contracts, shall ever be made, and no conviction shall work corruption of blood or forfeiture of estate" (article 8, § 16). The Constitution of 1848 (article 13, § 17) contained the

same clause, while the Constitution of 1870 declares: "All penalties shall be proportioned to the nature of the offense, and no conviction shall work corruption of blood or forfeiture of estate; nor shall any person be transported out of the state for any offense committed within the same."

There are in these several constitutional provisions clear and unequivocal declarations of the public policy of this state, to the effect that no forfeiture of property rights shall follow conviction for crime. This public policy is further manifested by our statute in regard to descent of property in case of intestacy, and the general power of disposition of property by will, conferred by our statute of wills. In none of these statutes is the right conferred in respect to property made to depend on the manner or cause of the death of the owner. To hold that the property of one who was executed in this state for a crime was not subject to the same law of descent and devise as property generally would be nothing less than judicial legislation by ingrafting exceptions in statutes where none exist by the language of the law. Statutes of descent and devise are legislative declarations of the public policy of the state on the subjects to which they relate. The rules of the common law on these subjects have been wholly superseded by our statutes. *Kochersperger v. Drake*, 167 Ill. 122, 47 N. E. 321, 41 L. R. A. 446; *Storrs v. St. Luke's Hospital*, 180 Ill. 368, 54 N. E. 185, 72 Am. St. Rep. 211; *Sayles v. Christie*, 187 Ill. 420, 58 N. E. 480; *In re Mulford*, 217 Ill. 242, 75 N. E. 345, 1 L. R. A. (N. S.) 341, 108 Am. St. Rep. 249, 3 Ann. Cas. 986.

Statutes of descent and devise similar to ours have generally been held not to exclude an heir or devisee from the benefits of these statutes on the ground that the heir or devisee had feloniously and intentionally destroyed the life of the person from whom the legacy or inheritance was expected. The Court of Appeals of New York, in *Riggs v. Palmer*, 115 N. Y. 506, 22 N. E. 188, 5 L. R. A. 340, 12 Am. St. Rep. 819, by a divided court decided against the right of a devisee who had murdered the testator to take under the will; but this case has not generally been regarded as sound by the other courts. In a well-considered case in Nebraska the Supreme Court of that state retracted its first opinion in the case, and upon a rehearing held that, under a statute of descent similar to ours, the fact that the father had feloniously murdered his child did not prevent the operation of the statute of descent, and that the felon inherited the estate of his victim. *Shellenberger v. Ransom*, 41 Neb. 641, 59 N. W. 935, 25 L. R. A. 564. The Supreme Court of North Carolina, in *Owens v. Owens*, 100 N. C. 240, 6 S. E. 794, decided that the fact that the wife had been convicted of being an accessory before the fact for the murder of her husband furnished no legal reason for denying her a dower in her husband's real estate. Another case in point is found in *Deem v. Milliken*, 6 Ohio Cir. Ct. R. 357. In this case the heir had murdered the ancestor, and it was held that he was entitled to in-

herit. The case of *Carpenter's Estate*, 170 Pa. 203, 32 Atl. 637, 29 L. R. A. 145, 50 Am. St. Rep. 765, holds that one who kills his ancestor for an estate that would naturally come to him under the statutes of descent and distribution may take it under a Constitution prohibiting attainders working corruption of blood and forfeitures of estates and under statutes providing no penalty for murder except by hanging.

We cite these cases, but not for the purpose of approving them. The question decided in them is not involved here. We refer to these cases merely to show that the courts refused, in the face of a plain statutory declaration of the public policy of the state, to interpolate, by construction, an exception thereto.

In *Holdom v. Ancient Order of United Workmen*, 159 Ill. 619, 43 N. E. 772, 31 L. R. A. 67, 50 Am. St. Rep. 183, this court held that an insane beneficiary who murdered the assured could recover. The cases of *Shellenberger v. Ransom* and *Owens v. Owens*, *supra*, are cited with approval by this court upon the general proposition that for the courts to declare a forfeiture for crime where the Legislature has remained silent is legislation by judicial tribunals—a subject with which they have no concern. These cases are much stronger than the one at bar. There is much more room for holding that one who has been the guilty agent in accelerating a death as a result of which he expects to come into an inheritance or legacy or a benefit under an insurance policy should be denied the benefits of his own wrong on grounds of public policy, than there is for denying innocent heirs, devisees, or beneficiaries their rights because the person through whom they claim was executed for crime. This court held in *Knights of Honor v. Menkhausen*, 209 Ill. 277, 70 N. E. 567, that, while a beneficiary who has murdered the assured could not recover, still the heirs of the assured who are within the class of eligible beneficiaries were entitled to recover, although not named in the certificate as beneficiaries.

The public policy of a state is to be sought for in its Constitution, legislative enactments, and judicial decisions. When the sovereign power of the state has by written Constitution declared the public policy of the state on a particular subject, the legislative and judicial departments of the government must accept such declaration as final. When the Legislature has declared, by law, the public policy of the state, the judicial department must remain silent, and, if a modification or change in such policy is desired, the lawmaking department must be applied to, and not the judiciary, whose function is to declare the law, but not to make it. Limiting their actions to questions left open by the Constitution and the statutes, courts may, no doubt, apply the principles of the common law to the requirements of the social, moral, and material conditions of the people of the state, and declare what rule of public policy seems best adapted to promote the peace, good order, and general welfare of the community. Hence arises the

rule that the decisions of its courts are to be investigated in determining the public policy of any government.

An insurance policy payable to the estate or personal representatives of the assured is a species of property. It is in the nature of a chose in action, which, subject to certain conditions, varying according to the terms of the contract, is payable upon the contingency of death or at a stated time. Life insurance has become an important factor in the commercial and social life of our people. To protect their credit, save their estates from embarrassment, and provide for dependent ones, the people of this state pay annually over \$30,000,000 in premiums for life insurance. See Official Report of Commissioner of Insurance, part 2, p. 6. The amount of insurance carried is approximately \$1,000,000,000. Why should this enormous property interest be subject to any different conditions than those applying to any other property owned by the people? If a man who is executed for crime has at his death \$1,000 in real estate, \$1,000 in chattels, and \$1,000 life insurance payable to his estate, his real estate descends to his heir, and his personal chattels to his administrator, but the \$1,000 life insurance must be left in the hands of the company who has received the premiums because it is said to be contrary to public policy to require the company to pay, lest by so doing it lend encouragement to other policy holders to seek murder, and execution therefor, in order that their estates or heirs might profit thereby. This is defendant in error's position. This contention seems to border closely on the absurd. We know of no rule of public policy in this state that will enforce this species of forfeiture, but there is a rule of law which has often been applied when two parties make a valid contract and the same has been completely performed by one party and nothing remains except the performance by the other, which will compel performance or award damages for the default against the delinquent party.

We are aware that courts have not always reached the same conclusion upon this question. So far as we are advised, all the cases in which the opposite conclusion has been reached are based upon the English case, *Amicable Society v. Bolland*, 4 Bligh (N. R.) 194, decided by the House of Lords in 1830. The facts in that case as stated by the Lord Chancellor are: "In January, 1815, Henry Fauntleroy insured his life with the Amicable Insurance Society. In the month of May, in the same year, he committed a forgery on the Bank of England. He continued to pay the premiums upon his insurance for a considerable period of time. In the year 1824 he was apprehended, and on the 29th of October in that year he was declared a bankrupt, and an assignment of his effects was made to the respondent. On the following day, the 30th of October, he was tried for forgery, found guilty, and sentenced to death, and in the month of November following was executed." The court held that there could be no recovery. The grounds of the decision were that to allow a

recovery would "take away one of those restraints operating on the minds of men against the commission of crime."

It should be borne in mind that forfeitures for the commission of crime were enforced in England at the time of this decision, and continued to be, with more or less severity, until abolished by 33 and 34 Victoria, passed in 1870. 1 Bouvier's Law Dict. p. 446; Schouler on Wills, § 33. The decision in the Bolland Case was based on the ground of public policy, and no doubt was in strict accordance with the established policy of Great Britain at that time. As a declaration of the public policy of the English government at the time the decision was announced, it must stand as conclusive evidence of such policy; but it is no evidence whatever that the same public policy prevails in any other nation or government. Each nation or state having the power to adopt a Constitution and legislate for itself necessarily has the inherent power to declare its own rules of public policy. There is nothing in international law or the comity between our states that requires our courts to enforce the consequences following the conviction for felony in obedience to the public policy of the state where the conviction is had, when to do so would be to depart from our own public policy on the same subject. A few citations will establish this principle.

All the authorities agree that a slave, on touching the land where slavery is not recognized, becomes free. *Purdy v. New York, etc., Railroad Co.*, 61 N. Y. 353; *Bailey v. Cromwell*, 3 Scam. 71; *Kinney v. Cook*, 3 Scam. 232; *Hone v. Ammons*, 14 Ill. 29; *Rodney v. Illinois Central Railroad Co.*, 19 Ill. 42. In the case last cited this court said: "The state of Illinois, as one of the independent sovereignties of the Union, will determine the condition of all persons within the state according to her own laws and institutions, and can be limited or controlled in this respect only by the Constitution of the United States and the laws of Congress made under authority of that instrument. Slavery in the states where it exists has its foundation in the municipal regulations of such states, which have no extraterritorial operation and no binding force in another sovereignty."

When one has been declared civilly dead under the law of his domicile, such sentence will not be regarded by other nations as having any extraterritorial effect. Wharton on Conflict of Laws, § 107. "Civil death," says Brocher, "raises a feeling of repulsion, whether the incapacity is presented singly or as a consequent of another punishment. It is a barbarism condemned by justice, by reason and by morality. The states which have abolished it cannot be held to accept it from the hands of a foreign Legislature." Wharton on Conflict of Laws, § 107, note. In regard to attainder for crime the rule is the same. Wharton, in his work on Conflict of Laws, says (volume 1, p. 254): "So far as England is concerned, while her shores have been the refuge of multitudes of persons who have been attainted and consigned to infamy by their respective sovereigns, there is no case on record

where such disabilities have been enforced by English courts." Story, in his work on Conflict of Laws, says that "an American court would deem them [such incapacities] purely local and incapable of being enforced here." A person who by reason of his conviction for an infamous offense cannot be a witness will not be incapacitated in another jurisdiction where the incapacity does not exist. Wharton on Crim. Evidence, § 363. The whole doctrine is condensed in one sentence by Wharton, as follows: "There is no such thing as ubiquity of national disabilities." See Conflict of Laws, §§ 7, 8, 101, 104, 113.

The question, therefore, is one to be determined by our own local rules of public policy. In view of these rules as evidenced by our Constitution and the statutes above referred to, we conclude that the execution of the assured for crime is no defense against an action upon a life insurance policy held by the person executed, in the absence of a stipulation exempting the company from liability for a death from this cause.

In view of the conclusions we have reached upon the question already discussed, the effect of the incontestable clause in this policy becomes of no importance and need not be further alluded to.

Regarding defendant in error's plea of *res judicata*, but little need be said. It will be remembered that by that plea defendant in error sets up a proceeding on this policy in the state of Pennsylvania, and it is to be noted that the plea is fatally defective, in that it contains no averment of a final judgment. The plea shows simply that a suit was commenced on this policy; that the company was ruled to present an affidavit of defense; that such affidavit was presented and it was adjudged sufficient. From this interlocutory order an appeal was taken to the superior court, where the ruling of the common pleas court was sustained. The case was not remanded for a trial and judgment, but the plaintiff was permitted to dismiss the case without prejudice. The rule is without exception that a plea of *res judicata* must show a final judgment entered by a court of competent jurisdiction. 24 Am. & Eng. Ency. of Law (2d Ed.) 793, and cases there cited. The demurrer to this plea, as well as to the one setting up the execution of the assured for crime, should have been sustained.

The judgment of the circuit court of Cook county and of the Appellate Court for the First District are reversed, and the cause remanded to the circuit court of Cook county, with directions to sustain the demurrer to the pleas, and for further proceedings in conformity with the views herein expressed. Reversed and remanded, with directions.⁹

⁹ Contra: *Burt v. Union Central Life Ins. Co.*, 187 U. S. 362, 23 Sup. Ct. 139, 47 L. Ed. 216 (1902); *Collins v. Metropolitan Life Ins. Co.*, 27 Pa. Super. Ct. 353 (1905). Accord: *McCue v. Northwestern Mut. Life Ins. Co.*, 167 Fed. 435, 93 C. C. A. 71 (1908). The decree in this case was, however, reversed in *Northwestern Mutual Life Ins. Co. v. McCue*, 223 U. S. 234, 32 Sup. Ct. 220, 58 L. Ed. — (1912).

V. Incontestable Clause ¹⁰

MASSACHUSETTS MUT. BEN. LIFE ASS'N v. ROBINSON.

(Supreme Court of Georgia, 1898. 104 Ga. 256, 30 S. E. 918, 42 L. R. A. 261.)

Action by Nora Robinson against the Massachusetts Mutual Benefit Life Association on a policy of insurance for \$5,000 issued by the defendant on the life of plaintiff's husband, John M. Robinson. The insured died on June 29, 1894. The defendant pleaded that the insured had procured the policy to be issued by false and fraudulent statements in his application, in that he had stated therein that he was not in the habit of using malt or spirituous liquors, and had never been in such habit, except as therein stated, whereas in truth and in fact he was an habitual drinker of intoxicating liquors, and had suffered from delirium tremens within less than three years from the date of the policy, and that the policy would not have been issued to him, if these facts had been known to the insurer.

At the trial there was much evidence tending to establish the fact that the insured had been for years in the habit of getting on sprees, which increased in number during the latter years of his life, and that he had been arrested on numerous occasions for public drunkenness. There was also evidence tending to show that this condition of affairs existed during the three years following the date of the policy. His habit as to sprees was public and notorious in the city of Atlanta, where he lived. He died in the "city stockade," having been sent there for public drunkenness. His death was caused by his being placed at hard labor on a very hot day, immediately following the excessive use of alcoholic stimulants. The plaintiff recovered a verdict for the full amount of the policy. A motion for a new trial was filed by the defendant, in which error was assigned upon various rulings made during the trial. The motion was overruled, and the defendant brings error.

COBB, J.¹¹ * * * In dealing with this case, the first matter to be considered arises out of questions made by the record in reference to what is commonly known as the "incontestable clause" in a policy of life insurance. This clause in the present case is in the following words: "This policy is incontestable after three years from its date, provided three full yearly premiums have been paid upon it, except that error in the age of the insured is open to adjustment, and, if

¹⁰ For discussion of principles, see Vance on Insurance, § 205. See, also, Cooley, Briefs on the Law of Insurance, vol. 8, pp. 2755-2758.

¹¹ Part of the opinion is omitted and the statement of facts is rewritten.

understated, the insured will be entitled only to the amount of insurance which the sum paid would have purchased at his correct age, if insurable in this association." The policy contains the contract entered into between the insurer and insured. The stipulations contained therein, as well as those set forth in other papers made a part of the contract by reference in the policy, must be looked to in order to ascertain upon what terms the parties agreed, and what are the rights and liabilities of each. Such a contract, from its very nature, requires that each party should act in perfect good faith with the other. The applicant for insurance must fully and freely disclose to the insurer all facts which would in any way throw light on the question then under consideration by the insurer; that is, whether it would be proper to enter into a stipulation with the applicant to insure his life. On the other hand, the insurer is under a like obligation to act in good faith with the applicant in regard to all matters where there is a duty resting upon him. That this duty rests respectively upon the applicant and the insurer in reference to all contracts of life insurance is well settled, and is fully recognized by the Code of this state. * * *

The contract entered into between the insurer and the insured in the "incontestable clause" is, in effect, that the insurer says, on his part, "Pay me your premiums according to the terms of the contract, and I will pay at your death, to the beneficiaries named in the policy, the amount thereof, without regard to the statements which you made in your application,—whether they be true, or whether they be false." Under such a contract the policy may be either absolutely incontestable, or it may be incontestable as to all matters of defense except such as are reserved in the policy. Such a policy may be incontestable from the very moment it is issued, or it may be incontestable after the lapse of a certain time after its issue. Such being the classes of incontestable policies, the question now arises, how far can such contracts be sustained by the law?

Where the incontestable clause provides that the policy shall not be defended on any ground except such as would amount to a fraud in the procurement of the policy, such a stipulation will be binding upon the parties, even though it was to take effect from the moment the policy was to be issued. Such was the view of the court of exchequer in the case of *Wood v. Dwarris*, 25 Law J. Exch. (N. S.) 129–131, where it was held that when an insurer holds out to the public that its policies shall be "indisputable" except in case of fraud, and the policy is effected upon the faith of that representation, the insurer is barred in equity from saying that the application for the policy stipulated that, if it contained any untrue statement, the policy should be void, and that it did contain such a statement. In the trial of this case Baron Martin remarked, "You have no right to set up such a defense as this, after having stated that you will not dispute except in cases of fraud."

A policy providing generally that it should be incontestable from its date, but silent on the subject of defending upon grounds originating in fraud, would still be a valid contract. The waiver of the right to defend on the ground of fraud not being the subject of express stipulation, the law would imply that the insurer intended to reserve to himself the right to defend upon that ground. If, however, the policy stipulated that it should be incontestable from its date, and the insurer should not be allowed any defenses, whether originating in fraud or otherwise, or if it were clear from the terms of the contract that it was the intention of the parties that fraud should not be a defense, then such a contract would be void, as being opposed to the policy of the law. Bliss, Ins. (2d Ed.) §§ 254, 255. But what is the legal effect of a contract of life insurance where it is stipulated that it shall become incontestable after the lapse of a specified period from the date of its issue, and that this incontestability shall apply to all defenses,—whether originating in the fraud of the applicant or not? Such is the character of the stipulation in the present case, with the exception as to age, set out in the clause quoted supra. While it is true that fraud voids all contracts, it is equally true that it is competent for the lawmaking power to fix a definite time in which an action shall be brought to declare a fraudulent contract void, and a failure on the part of the person defrauded to bring such action within the time designated would have the effect of debarring him from the right to set aside such a contract. While in such cases it is generally provided that the limitations so fixed shall not begin to operate in favor of the party who has committed the fraud until the same has been discovered, the duty is placed upon the party who seeks to avoid the contract on the ground of fraud to make such efforts to discover the fraud as would amount to ordinary diligence in law. Civ. Code, §§ 3669, 3711–3785; *Little v. Reynolds*, 101 Ga. 594, 28 S. E. 919, and cases cited.

As the law may prescribe such a limitation in which actions shall be brought by the party to be affected, it is also within the power of the contracting parties to agree among themselves upon a period of time which would amount to a statute of limitations, either greater or less than the period fixed by the law. *Telegraph Co. v. James*, 90 Ga. 254, 16 S. E. 83; *Brown v. Insurance Co.*, 24 Ga. 97; *Melson v. Insurance Co.*, and *Maril v. Same*, 97 Ga. 723, 25 S. E. 189; *Ritch v. Association*, 99 Ga. 112, 25 S. E. 191. The period fixed by law being intended for the benefit of the parties interested in the contract, and for their protection, it is competent for them to stipulate that the time which the law gives them to act shall be shortened, on the one hand, or lengthened, on the other. Parties interested in the contract may waive the benefit of the statute of limitations fixed by the law, the effect of the waiver being either to make a longer or shorter period than the law prescribes. What is said above would seem, however, to be subject to the qualification that where the effect of the contract

would be to vitalize, by the lapse of time fixed in the contract, an undertaking which would otherwise be void for fraud, the time fixed in which the party would have a right to rescind the contract on account of the fraud must be such a time as by the exercise of ordinary diligence the same could have been discovered. If the period so fixed is sufficient for the person, by the exercise of that care and diligence which an ordinarily prudent person would give to his own business, to ascertain whether a fraud has been perpetrated upon him, then the contract would be valid, and would be enforceable after the period had elapsed in which discovery of fraud, if any existed, was to be sought; and, even if actual fraud had been perpetrated, the party who was the victim of such fraud would be debarred of this defense.

Where parties enter into a contract which from its nature affords an opportunity to one party to perpetrate a fraud upon another, and it is stipulated therein that the party who is liable to be defrauded shall have a specified time in which to make inquiry as to the acts and conduct of the other party, he is on notice, by the very terms of the contract itself, that fraud may be involved in it, and the duty is upon him to commence at once an investigation into the acts, conduct, and representations of the other party; and if the time fixed is such that the information which would show that the fraud had been perpetrated could have been, by the exercise of ordinary diligence, obtained, then the parties are bound by their contract as to time, and after the lapse of that time fraud is no longer a defense. This does not violate in any way the well-settled principle that fraud is to be abhorred, vitiates everything it touches, and the person guilty of it is not to be countenanced in any way by the courts. While all this is true, it is equally well settled that a contract which has for its foundation a willful fraud may become vitalized and enforceable by the negligence of the party who was the victim of the fraud. * * *

As the terms of the incontestable clause in the present case were broad enough to exclude the defense of fraud, and as the time fixed in which the fraud must be discovered, if any had been perpetrated, was three years, and as this is, beyond question, a reasonable time, we feel no hesitancy in holding that the contract was valid, and that there was therefore no error in the ruling of the court below that the insurer could not set up as a defense to a suit on the policy any ground growing out of misrepresentation or concealment, although amounting to a fraud, after the policy had been in force three years, and three full yearly payments had been made thereon; there being no question of misrepresentation as to age. The present case is one peculiarly appropriate for an application of these principles. The very matter now set up to defeat the policy (that is, habits of drunkenness of the insured) was so public and notorious in the city in which he lived that it is manifest from the record that a letter addressed to any prominent business man or any city official at any time between the date of the first application for insurance to the date of the death of

the insured would have disclosed practically the state of affairs now shown to have existed.

There being no evidence before the trial court as to what the law of Massachusetts is as to contracts like the one in question, it will be presumed that the common law is of force there on the subject. *Railroad Co. v. Lacy*, 43 Ga. 461; *Pattillo v. Alexander*, 96 Ga. 60, 22 S. E. 646, 29 L. R. A. 616. There being nothing in the common law which would invalidate the contract, and it being consistent with the law of Georgia to give it effect, it will be enforced in the courts of this state.

It was contended that, even conceding the incontestable clause to be valid, still, under the terms of the policy in the present case, the insurer was not debarred from taking advantage of other defenses which it is claimed were embraced in the policy. The policy stipulated that "death of the insured in consequence of the use of intoxicating liquors or narcotics, or by his own hand or act, whether sane or insane, whether the act be voluntary or involuntary, is a risk not contemplated or covered by this contract, and against which this association does not insure," and that if "the insured shall fall into the habit of becoming intoxicated, or into the habitual use of narcotics, or shall have delirium tremens, within three years from the date hereof, then this contract shall be void; and in such event the insured hereby authorizes and directs the association to cancel this contract, and return to him the sum of all payments made thereon, which sum he agrees to accept, for himself, his heirs or assigns, in full and complete settlement of all liability of said association under this contract." The contract as contained in the policy must be construed as a whole, so that, if possible, each stipulation shall be made consistent with the others, and the whole allowed to stand. * * *

Construing the above-quoted clauses of the policy in connection with the incontestable clause, it would seem a proper interpretation of the three clauses, as a whole, that these things which were declared to be acts which would vitiate the policy were such as occurred within three years from its date, and that they should be valid and sufficient reasons for rescinding the contract and canceling the policy at any time within the period provided for. This would be a fair interpretation of the contract, and would appear, from the terms of the paper, to be the intention of the parties to it. But even if this were not true, and if the presence of the other two clauses raises a doubt as to whether they are consistent with the incontestable clause, as it is to be presumed that the incontestable clause was placed in the policy for the benefit of the insured the doubt as to the intention of the parties must be resolved by giving it a construction which would make that clause the controlling one. It seems to us that interpreting the policy fairly and reasonably, according to its terms, it was the intention of the parties that all grounds of defense which by the exercise of ordinary care

could have been discovered within three years, are intended to be cut off by the incontestable clause.

We think this view is abundantly sustained by the authority above cited, and also supported by reason. There can be no doubt that the interpretation which is placed upon every policy of the character of the one under consideration, by the holder, is that after the lapse of the period fixed the policy is to be free from defenses. It can be asserted with equal confidence that the fact that the holder in each case so understands is well known to the insurer. The incorporation into the policy of subsequent clauses which produce doubt, and make the policy difficult of interpretation, will not have the effect of relieving the insurer of the burden that is placed upon him by the rule which requires that the clauses in the policy "should receive the construction the insurer had reason to suppose was put upon them by the insured." *Wadsworth v. Tradesmen's Co.*, 132 N. Y. 540, 29 N. E. 1104.
* * *

In *Goodwin v. Society*, 97 Iowa, 226, 66 N. W. 157, 32 L. R. A. 473, 59 Am. St. Rep. 411, the application for insurance stated that the death of the insured by his own hand was a risk not assumed by the association, and the policy declared that a claim thereunder by death occurring two or more years after its date would be incontestable, except for fraud in procuring it. The court held that the society was liable in case of death by suicide occurring two or more years from the date of the policy. Deemer, J., in referring to the conflicting provisions of the policy, said that: "We have a case, then, for construction of these seemingly ambiguous and conflicting provisions. The tenets established for the guidance of courts in such matters are well understood, and no one is better established than that in all cases the policy must be liberally construed in favor of the assured, so as not to defeat, without a plain necessity, his claim for indemnity. And when the words used may, without violence, be given two interpretations, that which will sustain the claim and cover the loss should be adopted."

In *Association v. Payne* (Tex. Civ. App.) 32 S. W. 1063, where the court had under consideration a contract of insurance where one clause in a policy provided that, if a certificate should be in force five years, it should thereafter "be incontestable for any cause except for nonpayment of dues," and it was also provided in another clause that if the insured died by his own hand, whether voluntary or involuntary, sane or insane, the association would not be liable, it was held that the suicide of the insured after the policy had been in force five years would not relieve the company from liability. It has, however, been held that the incontestable clause does not have the effect of doing away with clauses in the policy merely regulating the remedy to be pursued by the person entitled to sue thereon, and that, if the policy stipulated that actions should be brought thereon within six months

from the death of the insured, there was no such inconsistency between this and the incontestable clause as would render the clause in regard to the time in which the suit should be brought inoperative. *Brady v. Insurance Co.*, 168 Pa. 645, 32 Atl. 102.

It would seem therefore to be the rule that, in regard to every matter which would have the effect of defeating or destroying the contract, the incontestable clause would be controlling, and stipulations in the policy to the contrary must yield, and that provisions in regard to remedies and conditions to be performed before suit is brought, and like conditions merely affecting the remedy to be pursued upon a valid contract, would not be affected by the clause as to incontestability.

* * * Affirmed.¹²

¹² Compare *Wright v. Benefit Life Ass'n*, 118 N. Y. 237, 23 N. E. 186, 6 L. R. A. 731, 16 Am. St. Rep. 749 (1890); *Welch v. Union Central Life Ins. Co.*, 108 Iowa, 224, 78 N. W. 853, 50 L. R. A. 774 (1899); *Union Central Life Ins. Co. v. Fox*, 106 Tenn. 347, 61 S. W. 62, 82 Am. St. Rep. 885 (1901).

MARINE INSURANCE

I. Implied Exceptions ¹

1. SEAWORTHINESS.²

DODGE v. BOSTON MARINE INS. CO.

(Supreme Judicial Court of Maine, 1892. 85 Me. 215, 27 Atl. 105.)

Action by T. Dodge against the Boston Marine Insurance Company, on a policy of marine insurance. Heard on report.

HASKELL, J. Assumpsit upon a policy of marine insurance, covering the freight of schooner Lyra on a voyage from Bangor to Boston.

We have said in *Hutchins v. Ford*, 82 Me. 370, 19 Atl. 833: "There was an implied warranty on the part of the owners that the brig was seaworthy at the inception of the voyage; that is, tight, staunch, strong, properly manned and provisioned, and suitably equipped for the voyage. This implied warranty was a condition precedent to any liability of the insurer, although the burden was upon the defendant to establish its breach, since seaworthiness of the brig at the inception of the risk is presumed. The presumption of seaworthiness at the inception of a risk under a marine policy may be rebutted, either by direct evidence of the ship's actual condition, or by proof of facts from which unseaworthiness may fairly be inferred; and when the latter is shown the insurance is destroyed, for the policy does not attach, and the premium would be without consideration, and may be recovered back. *Taylor v. Lowell*, 3 Mass. 347 [3 Am. Dec. 141]; *Paddock v. Insurance Co.*, 11 Pick. [Mass.] 227; *Swift v. Insurance Co.*, 122 Mass. 573." These doctrines are applicable to this case.

The Lyra, loaded with lumber, was towed down river, and lay at anchor over night. In the morning she made sail, and when barely in the bay sprang a leak without any apparent cause, there being no "stress of weather." Having a fair wind, she made Belfast waterlogged and unseaworthy. A survey was called, her cargo discharged and reshipped, and she was condemned, stripped, and torn up as useless. She was fifty years old, had met with disaster two months previous, was weak, and substantially worn out.

The evidence rebuts the presumption of seaworthiness, and clearly

¹ For discussion of principles, see Vance on Insurance, §§ 214-217.

² For discussion of principles, see Cooley, Briefs on the Law of Insurance, vol. 2, pp. 1253, 1553; vol. 3, p. 2896.

shows that the vessel must have been unseaworthy at the inception of the voyage. The insurance, therefore, never attached. The premium, however, may be recovered back under the money count.

Judgment for plaintiff for the premium only.

2. DEVIATION ³

HEARN v. NEW ENGLAND MUT. MARINE INS. CO.

(Circuit Court of United States, District of Massachusetts, 1870. 3 Cliff. 318, Fed. Cas. No. 6,301.)

Assumpsit by George Hearn against the New England Mutual Marine Insurance Company on a policy of marine insurance.

Before Clifford, Circuit Justice, and Lowell, District Judge.

CLIFFORD, Circuit Justice.⁴ Policies of insurance against marine risks are liberally construed, as they are regarded as commercial instruments in the strictest sense. Such instruments, where their terms are ambiguous, may be explained by parol evidence of the usages of trade; but where the terms employed are clear and precise in themselves, the principles which govern their construction do not vary from those which are applicable to other mercantile instruments, and no evidence of any usage or custom can be admitted to explain, alter, or impair the terms of the contract as made by the parties. *Oelricks v. Ford*, 23 How. [64 U. S.] 63, 16 L. Ed. 534; *Bliven v. Screw Co.*, 23 How. 431, 16 L. Ed. 510; 1 Arn. Ins. (2d Am. Ed.) 64.

Insurance was effected in this case at Boston on the 9th of May, 1866, in the sum of five thousand dollars "on charter of the barque Maria Henry, at and from Liverpool to port in Cuba, and at and thence to port of advice and discharge in Europe." When the application for the policy was made, the barque was at Liverpool, and it appears that she loaded at that port with a cargo of coal, and, having been regularly cleared from that port, proceeded thence without difficulty on her outward voyage to the port of St. Jago de Cuba, where she discharged her outward cargo, and that, having discharged her outward cargo, she sailed thence to Mansanilla, another port in Cuba, and there took on board a cargo of the products of the island, and on the 13th of September sailed thence for Europe via Falmouth for orders, and on the 18th of the same month was totally lost on her homeward voyage by perils of the sea. Due notice

³ For discussion of principles, see Cooley, *Briefs on the Law of Insurance*, vol. 2, pp. 1567-1591.

⁴ Part of the opinion is omitted and the statement of facts is rewritten.

of the loss was given to the defendants, and the loss is admitted as alleged, but the defendants refused to pay the amount insured, or any part of the same, upon the ground that the barque, without any justifying cause, departed from the prescribed course of the voyage as described in the policy on which the action is founded.

Reference was made in that proposition to the fact that the vessel, after she went to St. Jago de Cuba and there discharged her outward cargo, proceeded thence to Mansanilla for a return cargo before she sailed for Europe; but the plaintiff contended that going to a second port in Cuba did not constitute a deviation, as it is the usage for vessels bound from Liverpool and back, to discharge at one port and then to proceed to a second port for a return cargo. Nothing of the kind is expressed in the policy of insurance, if the words are to be taken in their ordinary signification; but the theory of the plaintiff is that such is the usage of the trade, and he insisted that parol evidence of such usage was admissible, and that the language of the policy should, in view of that evidence, be construed as conferring that right. Deviation in marine insurance is understood to mean a voluntary departure without necessity or reasonable cause from the regular and usual course of the specified voyage insured, which in this case was to port in Cuba, and at and thence to port of advice and discharge, as plainly and explicitly expressed in the policy. Whenever a deviation of that kind takes place, the voyage is determined and the underwriters are discharged from any responsibility. *Park, Ins.* 294; *Elliot v. Wilson*, 4 *Brown, Parl. Cas.* 470.

Different language is sometimes employed, as where the voyage is described as one from the port of departure to Cuba or to the island of Cuba, but the terms of the policy in the case before the court are "at and from Liverpool to port in Cuba, and at and thence to port of advice and discharge," showing a contract complete in itself, and one expressed in plain, clear, and unambiguous language, employing no terms of art nor any word or phrase of doubtful meaning. Unambiguous as the language is, the court cannot impute to the parties any other intention than that which they have expressed, as the court must do, to hold that port means ports, or port or ports, or to a port of discharge, and also to a second port for a return cargo and at and thence "to port of advice and discharge." Precisely the same question was presented in the case of *Brown v. Tayleur*, 4 *Adol. & E.* 241, and the court held that the word "port" in such a policy could not be construed to mean "ports," nor "port or ports," and that the going to a second port in such a case constituted a deviation, the judges giving their opinions seriatim, and all concurring in the conclusion. *Sea Ins. Co. v. Gavin*, 4 *Bligh (N. S.)* 578, 2 *Dow & C.* 125.

Evidence of usage, such as the plaintiff assumes in argument that he has offered in this case, if admissible for any legitimate purpose, must be expected to have the effect, and, if fully believed, ought to

have the effect, to induce the court to decide that a policy of insurance covering a voyage to a single port in Cuba may be construed, and if the evidence of such usage is full to the point, must be construed, to cover not only that voyage, but also a voyage to a second port for a return cargo, even though it be necessary in order to accomplish the purpose, to make a coasting voyage to the opposite side of that large and highly commercial island. Suppose, for example, the master in this case had gone to Matanzas, on the north side of the island, as his port of discharge, he might, under the theory of the plaintiff, have afterwards gone to Trinidad for a return cargo, which is on the southern side of the island. Every policy of insurance, if properly drawn, describes the place of the ship's departure, and also the place of destination, and the reason why a deviation discharges the underwriter is, that if the voyage is changed after the ship sails, the voyage becomes a different one, and not that against which the insurer has undertaken to indemnify. But in the case supposed, the insurer would be held responsible for a voyage from Matanzas to Trinidad, though no such voyage is mentioned in the policy.

Custom or usage is sometimes supposed to be admissible to show that the parties to a written instrument had something in their contemplation more than is expressed in what they have reduced to writing; but Lord Denman well said, in the case of *Trueman v. Loder*, 11 Adol. & E. 589, that the cases go no further than to permit the explanation of words used in a sense different from their ordinary meaning, or the addition of known terms not inconsistent with the written contract. Extrinsic evidence of custom and usage is doubtless admissible in certain cases, where the transaction is of a commercial character, to annex incidents to written contracts in respect to which the contracts are silent, but such evidence cannot be properly received if it is inconsistent with the terms of the written instrument, whether such inconsistency appears by the express terms of the written contract or by reasonable implication from the same as applied to the subject-matter. *Hutton v. Warren*, 1 Mees. & W. 475; 1 Smith, Lead. Cas. 387. Apply that rule, and it is clear that evidence of usage, if offered to show that the barque might go to one port to discharge and to a second for a return cargo, ought not to be admitted, as it is plainly inconsistent with the written contract, which is to port and at and thence to the return port. * * *

Certain cases are cited by the plaintiff, which, it is suggested, support the opposite theory, but when carefully examined it will be found that they do not have any such tendency. *Warre v. Miller*, 4 Barn. & C. 538; *Cruickshank v. Janson*, 2 Taunt. 301; *Dickey v. Ins. Co.*, 7 Cranch [11 U. S.] 327, 3 L. Ed. 360. At and from Grenada to London was the description of the voyage in the first case, and at and from Jamaica in the second, and at and from Trinidad in the case decided in the supreme court. Evidence was introduced in

the first case showing that there was but one custom-house for the whole island of Grenada, and inasmuch as the voyage insured was at and from Grenada and not at and from a port in Grenada, the court decided that the island must be considered as all one place, and that there was no deviation, although the vessel went to three places to discharge. Nothing different is asserted in the second case, and in the third the court decided that where the voyage as described in the policy is "at and from an island," the vessel may sail from port to port to take in cargo, but the decision has no application to the case at bar, as the voyage described in this case is to port in Cuba and at and thence to port of advice, which shows that the two cases are in no respect analogous.

Underwriters are presumed to be acquainted with the course of the trade they insure and with its peculiarities, and the court decided, in the case of *Noble v. Kennoway*, 2 Doug. 510, that in that trade, which was the Labrador trade, greater delay in landing the cargo was customary than would be justifiable in most other adventures. but it is not perceived that the case has much bearing upon the question under consideration. *Vallance v. Dewar*, 1 Camp. 503. Undoubtedly, evidence of usage was also admitted to explain the terms of the contract in the case of *Salvador v. Hopkins*, 3 Burrows, 1707. as suggested by the plaintiff, but the motion for new trial was overruled and the decision of the court placed expressly upon the ground that the evidence offered and admitted was not repugnant to the contract. Other cases of an analogous character are also referred to, where evidence of usage was admitted to explain some ambiguous phrase in the terms of the contract to which the same answer may be given, that the evidence admitted did not contradict what was in writing. *Uhde v. Walters*, 3 Camp. 16; *Hyde v. Willis*, Id. 202. Such evidence was also admitted in the case of *Gracie v. Marine Ins. Co.*, 8 Cranch [12 U. S.] 75, 3 L. Ed. 492, to show the boundaries and extent of a commercial port named in the policy as the port of destination, and it is quite clear that the ruling was correct, as the evidence tended to explain and not to contradict the terms of the policy, and a like ruling is found in the case of *Lowry v. Russell*, 8 Pick. (Mass.) 362, where the court overruled the objection to the evidence expressly upon the ground that it did not contradict the terms of the bill of lading.

Reliance is also placed upon the case of *Bulkley v. Protection Ins. Co.*, Fed. Cas. No. 2,118; but the case was decided wholly irrespective of any such question, as the evidence introduced failed to show that there was any such usage as the plaintiff supposed. The policy in that case described the voyage as from Ocrocoke to St. Bartholomew or St. Thomas, and at and from thence to Tobasco, and the court, and rightly, held that it did not authorize the assured to go to both ports, that he might go to either at his election, and that, having first stopped at the island of St. Bartholomew and after-

wards proceeded to St. Thomas, it was a deviation. "That the policy only covers a voyage to one or the other of those islands," said the judge, "cannot admit of a doubt," and if the sentence stopped there the case would be consistent with the recent decision of the supreme court, and all the other modern decisions upon the subject, but he adds, in continuation of the same sentence, "unless justified by usage," leaving it to be inferred that his opinion was that the evidence of usage would be admissible to incorporate a different meaning into the contract. But he could hardly have intended what the words imply, as in the next sentence he says that "it was at the election of the assured to go to either, to the one or the other, but the language of the policy is too plain and explicit to admit of a construction that it authorized a voyage to both," in which latter view we entirely concur. * * *

II. Perils of the Sea⁶

PERRY v. COBB.

(Supreme Judicial Court of Maine, 1896. 88 Me. 435, 34 Atl. 278, 49 L. R. A. 389.)

Bill in equity by J. C. Perry and others against W. T. Cobb and others on a contract of marine insurance. Heard on report.

HASKELL, J.⁷ * * * The plaintiffs contracted with the association for insurance to the amount of \$2,548 on a cargo of lime on board ship, under deck, at Rockland for New York. There were no conditions in the contract, except that 5 per cent. particular average on the whole value of the cargo was exempted from insurance. The vessel was 36 days at sea,—an unusually long time for the voyage, occasioned by rough weather, head winds, and successive gales. She sailed the 14th of February, and arrived the 21st of March. She labored heavily, and strained somewhat, but arrived tight, and with no special damage in the hull, save the loss of a skylight, some sails, and a compass box. On the 27th of March, she was given a berth, and broke cargo. Some 75 barrels of lime were discharged. About the 14th of April she was moved, and began the further discharge of

⁶ A bill in equity to reform the policy in this case was dismissed in *Hearn v. New England Mut. Mar. Ins. Co.*, Fed. Cas. No. 6,302 (1872). Similar actions by the same plaintiff against another company (*Hearn v. Equitable Safety Ins. Co.*) are to be found in Fed. Cas. No. 6,299 (1870), and Fed. Cas. No. 6,300 (1872).

⁶ For discussion of principles, see Vance on Insurance, § 218. See, also, Cooley, *Briefs on the Law of Insurance*, vol. 3, pp. 2882, 2892.

⁷ Part of the opinion is omitted.

cargo that was all out on the 28th. A few of the casks may have been stove, a few more showed signs of fire, and a few were bursting from swollen contents. The balance of the cargo was in bad condition, in that staves had shrunk and hoops loosened, allowing the lime to sift out and fall through the tiers of barrels to the deck or floor of the hold. No sea water reached the cargo, unless in a few instances when a hatch had been taken off, or when the cabin was flooded once. The damage from sea water must have been very slight, and did not affect the cargo, beyond the few barrels that it touched.

The insurance was against perils of the sea for a particular voyage. A voyage policy does not attach unless the vessel be seaworthy at the inception of the voyage, which is presumed, but may be rebutted. *Dodge v. Insurance Co.*, 85 Me. 215, 27 Atl. 105; *Hutchins v. Ford*, 82 Me. 370, 19 Atl. 832. It is so whether the insurance be upon the ship, or upon the cargo, or upon freight. *Van Wickle v. Insurance Co.*, 97 N. Y. 350; *Higgie v. American Lloyds (D. C.)* 11 Biss. 395, 14 Fed. 143; *Higgie v. National Lloyds, Id.*; *Daniels v. Harris*, L. R. 10 C. P. 1. "She must not be overloaded, and the cargo must not be badly stowed." Arn. 649.

In this cause the insurance was "at and from Rockland to New York,"—meaning until safely landed in New York, or for a reasonable time to land there under the usages of that port. The sea risk continued until the goods might be put on shore by reasonable dispatch. On the sixth day after arrival the vessel was given a berth at the wharf, and the hatches were opened. No damage to the cargo is claimed after that time, and no point is made that the insurance ended before. During the voyage the decks had been awash, and the cabin once flooded. Some sea water found its way to the cargo, and may have caused the bursting of a few casks, and the scorching of a few more; but this damage was far below the particular average—or, in this instance, partial loss—that had been excepted from the insurance. So that the remaining loss or damage was from the shrinking of the staves of the barrels, and slacking up of the cooperage, allowing their contents to sift out and fall through the tiers of barrels to the deck or floor of the hold, and leaving the barrels so tender that they could not easily be hoisted out of the hatch without danger of falling to pieces. This condition is claimed to have resulted from the rolling and pitching of the vessel, caused by the storms and bad weather of an unusually protracted voyage; and the question is, was it caused by a peril of the sea?

Tempests and rough weather are common incidents in sea transit. How long a voyage may continue is beyond the power of prophecy to foretell at the inception of it. Fair winds may serve, or head winds may drive the vessel off her course. The voyage policy continues until the port of discharge shall have been reached, and, if upon goods, until they may have been safely landed. If the goods

be of a perishable nature, and decay from a protracted voyage before they can be landed, the loss would not be from a peril of the sea. If the cargo be shaken and stove from the inherent weakness of the packages, unsuited to withstand the roughness of sea transit, or caused by the effect of their contents during the voyage, it would not be from a sea peril, but from natural causes produced either by the fault of the shipper, or by the inherent nature of the goods. The condition of the cargo when landed does not raise the inference that its injury resulted from a sea peril, but the burden rests upon the plaintiff to prove the fact.

No case has been cited at the bar that brings this loss within the hazard underwritten. *Insurance Co. v. Boon*, 95 U. S. 117, 24 L. Ed. 395, is a suit upon a fire policy on goods ashore. So is *Insurance Co. v. Tweed*, 7 Wall. 44, 19 L. Ed. 65. So is *Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256. *Montoya v. Assurance Co.*, 6 Exch. 451, is upon a marine policy on tobacco shipped with hides. Sea water caused the hides to putrefy and injure the tobacco, and it was held a sea peril; but the damage by sea water in the cause at bar did no mischief to the bulk of the cargo, and none resulted from the small part injured. In *Cory v. Insurance Co.*, 107 Mass. 140, 9 Am. Rep. 14, it is held that underwriters "do not assume the risk of ordinary perils incident to the course of the voyage, nor of damage arising from intrinsic qualities or defects of the thing insured," nor of "ordinary dampness of the hold, though aggravated by the length of the voyage and the variety of climate through which the vessel has passed in consequence of perils of the sea," because the result is attributable to the goods themselves, and not to sea perils, as the proximate cause. In *Neidlinger v. Insurance Co. (C. C.)* 11 Fed. 514, the policy was upon barley, with a clause excepting damage from must or mold, unless from actual contact with sea water, and the hazard was limited to that part of the barley actually wetted. *Taylor v. Dunbar*, L. R. 4 C. P. 206, holds that the decay of meat during a voyage protracted by tempestuous weather is not within the terms of a marine policy. In *Boyd v. Dubois*, 3 Camp. 133, Lord Ellenborough said: "If the hemp was put on board in a state liable to effervesce, and did effervesce and generate the fire which consumed it, upon the common principles of insurance law the assured cannot recover for a loss which he himself has occasioned." *Crofts v. Marshall*, 7 Car. & P. 646, is an insurance of 36 casks of oil, and, the cargo not having shifted, a part of them were found empty, and others had lost a part of their contents. The jury disagreed as to whether the leakage was from perils of the sea, and the court gave judgment for defendant by consent. These are all the cases cited by the plaintiffs.

The general rule is that everything which happens through the inherent vice of the thing, or by the act of the owners, master, or merchant shipper, shall not be reputed a peril, if not otherwise borne on

the policy. Emerig. Ins. 290; Insurance Co. v. Adler, 65 Md. 162, 4 Atl. 121, 57 Am. Rep. 314; Baldwin v. Railway Co., L. R. 9 Q. B. 582; Baker v. Insurance Co., 12 Gray (Mass.) 603; Cory v. Insurance Co., 107 Mass. 140, 9 Am. Rep. 14; Boyd v. Dubois, 3 Camp. 133. If the inherent vice be stimulated by a protracted voyage, it is still no loss from a peril of the sea. Cory v. Insurance Co., supra; Taylor v. Dunbar, L. R. 4 C. P. 206. So it is if the loss be from some other intervening cause, as where slaves die from starvation, from the failure of provisions during an unusually long voyage, occasioned by bad weather. Tatham v. Hodgson, 6 Term R. 307.

Lord Ellenborough, in Cullen v. Butler, 5 Maule & S. 461, distinguishes between perils on the seas and perils of the seas. Lord Herschell says the latter phrase "does not cover every accident or casualty which may happen to the subject-matter of the insurance on the sea. It must be a peril of the sea. * * * There must be some casualty—something that could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against accidents which must happen." The Xantho, 12 App. Cas. 503.

It is not always easy to mark the line between the ordinary operation of the elements and their perilous action. The latter must be the proximate cause of the loss. Lord Bacon's reason is: "It were infinite for the law to consider the causes of causes, and their impulses one on another. Therefore it contenteth itself with the immediate cause." Gow, Ins. §§ 92, 137.

In applying this rule to the cause at bar, the only direct damage to the cargo clearly shown is that resulting from the contact with sea water, amounting to less than the particular average excepted. The remaining damage to the cargo is not shown to have resulted but from the unexpectedly long voyage, that may have excited the inherent qualities of the goods, causing the packages to shrink and scatter their contents so as to need cooperage before they could be safely raised through the hatch. All authorities agree that a protracted voyage is not a sea peril, within a marine policy, because it is not an unusual event, but one of the natural incidents to sea transit. Insurance is not on the voyage, but for the voyage. Pole v. Fitzgerald. Willes, 644.

If damage to the cargo resulted from its inherent vice that worked the mischief under natural conditions, it was not a sea peril. Had the voyage been performed in a week, such results would not have been expected. The evidence is conflicting as to the proximate cause for the condition of the cargo upon its arrival. The associates, to whom it was agreed to submit the question of liability, are men of large experience in burning and shipping lime. They are all fair men, and appear to have heard the controversy with patience; and, after full investigation, all but the plaintiff agreed that he had no

claim, and so decided. Their decision must have great weight upon the fact as to whether the condition of the cargo, upon its arrival in New York, was other than what might have been expected from ordinary sea weather at that time of year, February and March, during a voyage of 36 days, without any unusual sea peril. The cargo arrived all in position. It had not shifted or been knocked to pieces by the vessel having been thrown on her beam ends, or wrecked or stranded.

But it may be said that the damage, within the particular average clause, gave the cargo a bad reputation, and thereby lessened its market value. This result might be, and yet not be within the terms of the policy. *Bennecke, Ins.* 438. No case is cited that holds such doctrine. On the contrary, *Cator v. Insurance Co.*, L. R. 8 C. P. 552, holds the reverse. That was insurance upon packages of tea. Some were damaged, and others were not; but the damage was restricted to the former, although there was a clause in the policy excepting damage other than by contact with sea water. The court held the rule would be the same without the clause, for insurance covers actual damage, and not suspicion of damage. *Montoya v. Insurance Co.*, 6 Exch. 451, *supra*, comes the nearest to an authority for the contention, but there the tobacco was actually injured from the fumes of the putrefying hides. So in *Lawrence v. Aberdeen*, 5 Barn. & Adol. 107, approved in *Gabay v. Lloyd*, 3 Barn. & C. 793.
* * * Dismissed.

MILLER v. CALIFORNIA INS. CO.

(Supreme Court of California, 1888. 76 Cal. 145, 18 Pac. 155, 9 Am. St. Rep. 184.)

Action on a policy of insurance, brought by M. J. Miller against the California Insurance Company, for the loss of the steamer Pilot. A general demurrer was entered and sustained, and judgment rendered for defendant, from which plaintiff appealed.

PATERSON, J. 1. This is an action brought on a policy of marine insurance issued by the respondent on the steamer Pilot. The risks insured against were as follows: "Touching the adventures and perils which this insurance company is content to bear and take upon itself in this policy, they are of seas, fires, pirates, assailing thieves, jettison, barratry of the master or mariners, (unless the assured be owner or part owner of the vessel,) embezzlement and illicit trade excepted in all cases, and all other losses and misfortunes that shall come to the hurt, damage, or detriment of the said vessel, or any part thereof, to which insurers are liable by the rules and customs of insurance in San Francisco, excepting such losses and misfortunes as are excluded by this policy. * * * It is also agreed that in case of insurance on a steamer this company is not liable for any injury,

derangement, or breakage of the machinery or bursting of the boilers unless occasioned by stranding."

The complaint alleges that on May 25, 1883, "the boiler on said vessel exploded, and said vessel became then and there unmanageable, and swung around on the water, and within a few minutes thereafter sank and became a total wreck, and was wholly and totally lost to the owner thereof, and was abandoned by the owner to defendant. There is no allegation in the complaint that under the customs of insurance in San Francisco insurers are liable for explosions of boilers, or damages resulting therefrom. A demurrer to the complaint was filed on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was sustained, and, plaintiff declining to amend, judgment was entered for defendant.

Passing over the question as to the sufficiency of the allegation in the complaint to show that the destruction of the vessel was caused by the bursting of the boiler, or by any other means admitted to be such as would make the company liable, and conceding that the complaint shows the loss to have occurred by reason of the bursting of the boiler without any fault of the plaintiff, these inquiries remain: First, is the explosion of the boiler a peril of the sea within the first clause above quoted? and, second, if it be a peril of the sea, are not the damages resulting therefrom excepted under the special provision of the policy which is quoted above, and which relates to the bursting of the boilers?

Perils of the sea are defined by our Civil Code to be "storms and waves; rocks, shoals, and rapids; other obstacles, though of human origin; changes of climate; the confinement necessary at sea; animals peculiar to the sea; and all other dangers peculiar to the sea." Civil Code, § 2199. The bursting of a boiler is not within any of the first six causes named. Is it a danger peculiar to the sea? Perils of the sea have been defined to be "all perils, losses, and misfortunes of a marine character, or of a character incident to a ship as such." *T. & M. I. Co. v. H. F. & Co.*, House of Lords, July 14, 1887. In that case it was said: "The damage to the donkey-engine was not through its being in a ship at sea. The same thing would have happened had the boiler and engines been on land, if the same mismanagement had taken place. The sea, waves, and wind had nothing to do with it. * * * It is, I think, impossible to say that this is damage occasioned by a cause similar to perils of the sea on any interpretation which has ever been applied to that term. It will be observed that Lord Ellenborough limits the operation of the clause to marine damage. By this I do not understand him to mean only damage which has been caused by the sea, but damage of a character to which a marine adventure is subject. Such an adventure has its own perils, to which either it is exclusively subject, or which

possess, in relation to it, a special or peculiar character. To secure an indemnity against these is the purpose and object of a policy of marine insurance. * * * But the explosion of the boiler on board the Panama had no marine character at all. It might have happened in precisely the same way, and done the same kind of damage, if a similar engine had been in use for the purpose of moving manufacturing machinery on shore." These views seem to express very clearly the proper meaning of the seventh clause of section 2199, *supra*.

In support of the contention that an explosion of the boiler is a peril embraced within the list of perils insured against by this policy, appellant cites *Administrators of Perrin v. Insurance Co.*, 11 Ohio, 169, 38 Am. Dec. 728, and *Insurance Co. v. Glasgow*, 9 Mo. 413. In the Ohio case the risks insured against were described in the policy as follows: "Of the seas, rivers, fires, enemies, pirates of the rivers, assailing thieves, and all other losses and misfortunes which shall come to the damage of said steam-boat according to the true intent and meaning of said policy." It was there held that the loss occasioned by the bursting of a boiler was a loss within the policy, but we do not understand the court to have held in that case that such a loss was a loss by peril of the seas. In *Telegraph Co. v. Insurance Co.*, 6 Q. B. Div. 57, the Ohio case was quoted approvingly, yet it was there held that the bursting of a boiler was a peril not within the general term "perils of the sea." In *Insurance Co. v. Glasgow*, *supra*, it seems that the policy was the same as in the Ohio case.

In all the cases cited it was held simply that the loss was one which came within the insurance clause providing against "all other perils, losses," etc. In the case before us the general clause is, "and all other losses and misfortunes that shall come to the hurt, damage, or detriment of the said vessel, or any part thereof, to which insurers are liable by the rules and customs of insurance in San Francisco, excepting such losses and misfortunes as are excluded by this policy." Our conclusion is that the loss complained of herein is not within either the meaning of the term "perils of the sea" as defined in our Civil Code, or as understood in the law of marine insurance generally; and, of course, if the loss be one which falls under the general clause of the policy, it is sufficient to say that there is no allegation that by the customs of insurance in San Francisco insurers are liable for explosions of boilers, or damages resulting therefrom.

2. The construction we place upon the clause of the policy above quoted renders it unnecessary to consider whether the damages are not in any event excepted under that provision of the policy relating to the bursting of boilers. It is proper to say, however, that a clause precisely the same in language was considered by the court of appeals in *Strong v. Insurance Co.*, 31 N. Y. 103, 88 Am. Dec. 242. It was there held that the language is to be understood to mean that

the company is not to be liable for damage resulting to the vessel or otherwise on account of the bursting of the boilers, unless occasioned by stranding. Judgment affirmed.

III. Particular and General Average Losses ^s

1. IN GENERAL

COSTER v. PHŒNIX INS. CO.

(Circuit Court of United States, District of Pennsylvania, 1807. 2 Wash. C. C. 51, Fed. Cas. No. 3,264.)

This was a case agreed, which stated, that in 1805, an order for insurance of goods on board the ship Draper, at and from New York to Amsterdam, was given by the plaintiff's agent to the defendants; in which it was stated the same were to be free of average under ten per cent. On the 26th of December, 1805, a policy was subscribed by the defendants on goods on board the same ship, at and from New York to Amsterdam, at five per cent.; which insurance was declared to be made on one hundred and twenty-five bales of cotton, and thirty-six boxes of sugar, valued at 12,150 dollars, and warranted free from average under ten per cent., and with other warranties not in question. That the following (printed) clause was also contained in the policy, viz. "Memoranda. It is agreed that salt, wheat, Indian corn, peas, or any other kind of grain, malt, dried fish stowed in bulk, leaf tobacco or otherwise, fruit of all kinds, and any other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; all other goods free from average under five per cent., unless general." The vessel sailed from New York, and arrived in the Texel, where she was subjected to certain extraordinary expenses and damages, of the nature of general average.

The question submitted to the court was, whether the defendants are liable and chargeable with the said average loss, being general, but under ten per cent. If the court should be of opinion that the defendants are liable for the said general average, judgment to be rendered for the plaintiff; the amount to be agreed upon by the parties. If the opinion should be that they are not so liable, judgment to be rendered for the defendants.

^sFor discussion of principles, see Vance on Insurance, §§ 223, 224. See, also, Cooley, Briefs on the Law of Insurance, vol. 4, pp. 2968, 2995.

WASHINGTON, Circuit Justice. The word "average" originally meant a contribution, by the owner of the ship, cargo, and freight, towards a loss sustained for the general benefit of all. But when understood in this sense, it is at this day always called "general," to distinguish it from "particular" average, which means nothing more than a partial loss. So that from the time that the term "average" was used to express a partial loss, the word "average" has, in the common understanding of commercial men, so far varied its original meaning when applied to original insurances, as to import as well a general contribution, as a particular loss; and is intended to be used in either of those ways: the adjuncts "general," "partial," or "particular," are always affixed.

An attention to the true meaning of this phrase will assist us in understanding the point in controversy. The printed clause liberates the underwriters from particular average to any amount, on articles of a perishable nature, and on other articles where the loss amounts to less than five per cent. The written clause discharges the underwriter from all responsibility for average losses, whether general or particular, under ten per cent. These clauses are inconsistent with each other, and one or the other must give way. If the written clause varies from the printed, it is evidence of a special contract made in that particular case, different from the usual contract of insurances; and it must necessarily be considered as the real agreement of the parties. If the written and the printed clauses can be reconciled by any fair construction, it ought to be done; if they cannot, the former must prevail. Whether, in this case, the not qualifying the general expressions, proceeded from mistake or was designed, is quite uncertain. The insured may possibly have expected that the usual words, "unless general," would be added, and the underwriter may have taken a smaller premium in consideration of being exempted from general average losses, under ten per cent. There is no certain ground to go upon, but the construction fairly deducible from the expressions which the parties have used.

The opinion of the court therefore is, that the defendants are not liable for the average loss, and that judgment should be rendered for them.

2. GENERAL AVERAGE

MUTUAL SAFETY INS. CO. v. CARGO OF THE GEORGE.

(District Court of United States, Southern District of New York, 1845.
Olc. 89, Fed. Cas. No. 9,981.)

The cargo and its proceeds are libelled in this action by three insurance companies [the Mutual Safety Insurance Company, the American Insurance Company, and the Jackson Marine Insurance Company], underwriters on ship and freight, to recover a contribution share on general average, claimed to be payable by the cargo on board the ship George, because of a voluntary stranding of the vessel by her master to save the cargo and freight. The underwriters had accepted the abandonment of the ship and freight after the loss of the ship, and paid a total loss on the vessel and freight.

The facts are as follows: The George, being insured by the libellants, (all the three companies having underwritten the vessel to the valued amount of twelve thousand dollars, four thousand dollars each, and the Mutual Safety Insurance Company having underwritten the freight to the amount of \$4,400, on a valuation of \$6,800,) sailed in May, 1841, from New Orleans to Trieste, with a cargo of cotton, consigned to the claimants, Reyea & Schlick. When about six days out, the vessel met with heavy weather, and sprung a leak. The leak increased, and the master, after making a fruitless attempt to reach the harbor of Nassau, finally, with the view to save the cargo from destruction, ran the ship on a reef, about three-quarters of a mile from the main land on the west end of the Grand Bahamas. The vessel and freight were wholly lost, and after abandonment to the underwriters, a total loss was paid by them. A large portion of the cotton was saved, and the proceeds came to the hands of the defendants, [Josiah] Macy & Son, as agents of Reyea & Schlick, and Livingston & Barclay. The libel was now filed in rem against the cargo and its proceeds, on the ground that they were bound to contribute in general average to the loss of the vessel and freight, and in personam against the respondents, as holders of those proceeds or parts of the cargo.

BETTS, District Judge.* * * The point most contested on the hearing is involved in the objection that the ship-owner is not entitled to bring the value of the ship into contribution on general average, when the peril to which she was voluntarily exposed resulted in her total loss and destruction. The facts of the case are free from

* The statement of facts is abridged from the original report and part of the opinion is omitted.

all conflict, and upon the testimony of the master, it appears the vessel was voluntarily run ashore by him to save the cargo, the lives on board not being in danger, and was totally lost in consequence. The policy and justness of the rule which, in my opinion, warrants this demand, is clearly manifested by these facts, because, if the probable or even possible destruction of the ship might follow the act, the master would have no inducement to risk that sacrifice, if, when the total loss followed, no claim for indemnity could be maintained against the cargo and freight for whose benefit it was made. In this act are all the requisites to a case of general average. The exposure of the ship to loss was voluntarily made by the master and crew for the common benefit of the shippers, and solely for the purpose of saving the cargo. It conduced to their preservation.

The controlling test in questions of average is the voluntary placing of part of the property in peril by the master and crew, for the safety of the residue. 2 Browne, Civ. & Adm. Law, 199; *Whittridge v. Norris*, 6 Mass. 125. And in vindication of the soundness of the new rule, admitted in the American courts, giving the value of the ship when she is totally lost a right to contribution, Ch. J. Tilghman, in *Gray v. Waln*, says, if the case is not one of general average, because the ship was totally lost, the result would be that for a small loss there shall be compensation, but a great loss is to go without compensation. 2 Serg. & R. (Pa.) 229, 7 Am. Dec. 642.

To constitute a case of general average it is admitted to be essential that the ship and cargo should be in common danger, and that a part should be sacrificed for the preservation of the remainder, or, as is laid down by Emerigon (volume 1, 603), "*le dommage n'est avaire grosse, que dans les cas ou il été opéré volontairement pour le salut commerce.*" All these ingredients to a case of general average are proved to exist in the present instance, and it varies only from those described and approved in the earliest edicts and adjudications on the subject, in the feature, that the ship was subjected to a total instead of a partial loss, in the effort to save the cargo. This consideration augments the equity of the claim that such loss should be apportioned, and the property saved should contribute towards its remuneration.

The argument against the claim attempts to replace the old doctrine declared by Emerigon and sanctioned by the supreme court of New York, excluding the owners of a ship totally lost from participation in the general average shared by the owners of cargo and freight. *Bradhurst v. Columbian Ins. Co.*, 9 Johns. 9; Emerig. vol. 1, c. 12, § 13, p. 614. "It will be general average if the stranding has been voluntarily made for the common safety, provided, always, that the ship be again set afloat; for if the stranding be followed by shipwreck, then it is, save who can." To do this effectually, the effort is made to distinguish the facts and principles acted upon by the supreme court of the United States and other American tribunals,

from the broad and direct proposition presented by this case. But in my judgment no sound distinction can be shown between them, and the scope and force of the reasoning and conclusions of the supreme court embrace and dispose of every material question made upon that point in the case.

Judge Story, in speaking for the court (*Columbian Ins. Co. v. Ashby*, 13 Pet. 339, 10 L. Ed. 186): Surely, says he, the question of contribution cannot depend upon the amount of the damage sustained by the sacrifice, for that would be to say, that if a man lost all his property for the common benefit, he should receive nothing; but if he lost a part only he should receive full compensation, and emphatically declares the law to be that a voluntary stranding of the ship, followed by a total loss of the ship, but with a saving of the cargo, constitute, when designed for the common safety, a clear case of general average. In this cardinal doctrine other influential decisions concur. The principle to be gathered from the new application of the rule is, that if the voluntary act of the master and crew is the direct occasion, the efficient motive and cause of the stranding, the loss becomes one of general average. *Caze v. Reilly*, Fed. Cas. No. 2,538; 2 Browne, Civ. & Adm. Law, 199; *Whitteridge v. Norris*, 6 Mass. 125; *Gray v. Waln*, 2 Serg. & R. (Pa.) 229, 7 Am. Dec. 642; *Sims v. Gurney*, 4 Bin. 513.

The Rhodian law, whence the doctrine of contribution is derived, is founded upon this principle, *jactus factus levandæ navis gratiâ*. The particular loss incurred is elected, with a view to the safety of what remains. 2 Cond. Marsh. 536. There is nothing in the adage of the Rhodian edict which imports that a partial injury of the property put in peril is all that is contemplated by the devotion of it to relieve the common peril; on the contrary, the larger doctrine has always been deduced from it, that as the jettison is unreserved, and may naturally result in the entire loss of the property abandoned to the risk, so the average remuneration shall correspond to and be measured by the degree of loss. *Jac. Sea Laws*, 345; *Wesk. Ins.* (Fol. Ed.) tit. "General Average, Jettison"; *Abb. Shipp.* (Ed. 1829) 348; 3 Kent, Comm. (3d Ed.) 232.

This reference to the foundation of the law of general average is sufficient to indicate that the application of its rules and principles by the supreme court of this state (9 Johns. 9) is in restraint of the exalted and comprehensive equity it is designed to accomplish in cases of common perils wherein the property of one is sacrificed to promote the safety of others standing in equal exposure. Had the counsel then succeeded on this argument in raising a doubt whether the conclusions of the supreme court (13 Pet. [38 U. S.] 339, 10 L. Ed. 186) were in conformity with antecedent adjudications or usages on this subject, the doctrine of that decision supplies the more satisfactory exposition of this important branch of maritime law, and gives a rule eminently adapted to the exigencies of commercial navigation.

Independent of this acquiescence in the soundness of the views of the court in that case, I should feel bound to conform to its expositions of the general principles and rules applicable to average claims, although the particular facts of this case may be shown not to be exactly coincident with those on which that judgment was founded. The leading feature of that case embodies the principle which controls this. But even if it could be demonstrated that the conclusions of the supreme court were speculative and hypothetical, the solemn enunciation and sanction of a rule of maritime law, by that high tribunal, would be a guide and light I should not fail to follow in the administration of that law in this court.

In commercial and maritime questions, the federal courts are not governed by the jurisprudence of particular states, but by the general principles and doctrines of commercial law, or the law-merchant. *Swift v. Tyson*, 16 Pet. (41 U. S.) 1, 10 L. Ed. 865. I shall, therefore, hold the libellants, representing the rights of the owners of the ship, as entitled to contributions on general average upon her value, at the place of loss, notwithstanding she was totally lost by the stranding. The act was voluntarily done by the master with a view to the safety of the cargo alone. They are entitled to contribution toward the loss, from all that was saved, including cargo and freight. The ship, cargo and freight are to be estimated at their full value, at the place of stranding. That value will be ascertained on the adjustment of the average by appropriate proof. The invoices and bills of lading will be received as evidence of the value of the cargo at the place of purchase and shipment, and the policies may be consulted as evidence conducing to prove the worth of the ship at the port of departure, and the value of the freight lost. 3 Kent, Comm. 167; Abb. Shipp. 607; 2 Cond. Marsh. 618.

But additional evidence of the value must be produced. The principles governing the valuation between assured and assurers, are not conclusive in cases of average, because, in the first instance, the policy is the common act of the parties in interest, and may estop all question as to valuation, whilst on general average interests are brought in which are not controlled by the policy. Still I think the policies may be admissible before the adjusters as auxiliary proof of the value of the ship, cargo or freight. The decree will be drawn up in correspondence with this decision, and all questions of law which may properly be raised on the proceedings of the adjusters under it, may be brought forward for consideration on the coming in of the adjustment or auditor's report. * * * Decree for libellants.

3. PARTICULAR AVERAGE

WASHBURN & MOEN MFG. CO. v. RELIANCE MARINE
INS. CO.

(Supreme Court of United States, 1900. 179 U. S. 1, 21 Sup. Ct. 1, 45 L. Ed. 49.)

On Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit to review a decision affirming a decree of the Circuit Court in an action at law brought on a policy of marine insurance in a state court and thence removed into the Circuit Court of the United States for the District of Massachusetts.

See same case below, 50 U. S. App. 231, 82 Fed. 296, 27 C. C. A. 134.

This was an action at law brought in the superior court of Massachusetts for the county of Suffolk, and thence removed into the circuit court of the United States for the district of Massachusetts, by the Washburn & Moen Manufacturing Company against the Reliance Marine Insurance Company (Limited) of London, England, on a policy of marine insurance taken out, March 15, 1893, in the sum of \$48,800, on a cargo of wire shipped from Boston to Velasco, Texas, on the schooner Benjamin Hale, John Hall, master.

The memorandum clause of the policy ran thus: "Memorandum. It is also agreed that bar, bundle, rod, hoop, and sheet iron, wire of all kinds, tin plates, steel, madder, sumac, wickerware, and willow (manufactured or otherwise), salt, grain of all kinds, tobacco, Indian meal, fruits (whether preserved or otherwise), cheese, dry fish, hay, vegetables and roots, rags, hempen yarn, bags, cotton bagging, and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking-glasses, and all other articles that are perishable in their own nature, are warranted by the assured free from average, unless general; hemp, tobacco stems, matting, and cassia, except in boxes, free from average under 20 per cent unless general; and sugar, flax, flaxseed, and bread are warranted by the assured free from average under 7 per cent unless general; and coffee in bags or bulk, pepper in bags or bulk, and rice, free from average under 10 per cent unless general."

And on the margin the following was stamped or written: "Free of particular average, but liable for absolute total loss of a part if amounting to five (5 %) per cent."

The Benjamin Hale sailed for Velasco, March 31, 1893, and on April 15 ran ashore on Bahama Banks, but, after throwing overboard 200 reels of barbed wire, floated and proceeded. On the night of April 19 the schooner again ran ashore, on Bird Key, near Dry Tortu-

gas, and largely filled with water. Wreckers came on board April 21. The master went to Key West, and from thence telegraphed the Washburn & Moen Company, April 24, that the vessel was ashore, and he thought the loss was total. April 24, 25, or 26 the agent of that company told the agent of the insurance company, in Boston, "what he knew in regard to the troubles, and said that he wished to abandon the cargo to the underwriters." April 29 a written notice of abandonment was given, which the insurance company explicitly declined to accept. The master returned at once with further assistance, reaching the wreck the morning of April 25, and the vessel was floated April 29, and finally taken to Key West, arriving May 4. The captain testified that "from the time the vessel went ashore until she came off they were taking the cargo out as they could so as to get her off. * * * Think about one half of cargo was discharged on the reef, of which he thinks about 1,300 reels were dry." This was substantially all carried to Key West, where the unloading was completed May 10.

Captain Hall made a memorandum at Key West as to the condition of the cargo when landed there. From this it appeared that out of 13,051 reels of barbed wire, shipped from Boston, 12,277 (or 12,625) were landed at Key West, of which 989 were perfectly dry, and 10,448 had received "hardly perceptible" damage. Of plain wire, 1,102 bundles were shipped, and all landed at Key West, and 464 were stated to be nearly dry. Five reels of salamander wire and a wire rope were all landed and transshipped dry and unimpaired; also 243 kegs of staples out of 249; and 478 bundles of hay bands out of 1,050.

The goods were forwarded from Key West to Velasco on the schooner Cactus, where they were tendered to the Washburn & Moen Company, which refused to receive them. That company again abandoned, and the insurance company again declined to accept abandonment.

At this time a very large part of the goods existed in specie, and a considerable part was practically uninjured. There were no facilities for handling, and no market for, barbed wire at Key West, but there were at Velasco, which was also but 60 miles by rail from Houston, the headquarters of the general agent of the manufacturing company in Texas.

The goods were afterwards sold by order of court on the libel of the master of the Cactus for freight, demurrage, and expenses, and realized \$10,000.

Mr. Chief Justice FULLER delivered the opinion of the court.¹⁰

By the memorandum, wire of all kinds was expressly "warranted by the assured free from average unless general;" and by the rider,

¹⁰ The statement of facts is abridged from the original report and part of the opinion is omitted.

"free of particular average, but liable for absolute total loss of a part if amounting to 5 per cent."

The memorandum and marginal clauses were in *pari materia* and to be read together. They were not contradictory, and the rider merely operated to qualify the memorandum by allowing recovery for an actual total loss in part, which could not otherwise be had. In other words, the qualification was manifestly inserted so that, while conceding that under the memorandum clause no liability was undertaken for a constructive total loss but only a liability for an actual total loss, the insurers might be held for an actual total loss of a part.

The contracting parties thus recognized the rule that articles warranted free of particular average, or free from average unless general, are insured only against an actual total loss.

The warranty or memorandum clause was introduced into policies for the protection of the insurer from liability for any partial loss whatever on certain enumerated articles, regarded as perishable in their nature, and upon certain others none under a given rate per cent. This was about 1749, and since then, in the growth of commerce, the list of articles freed by the stipulation from particular average has been enlarged so as to embrace many, which, though they may not be inherently perishable, are in their nature peculiarly susceptible to damage.

The early form ran as follows: "Corn, fish, salt, fruit, flour, and seed are warranted free from average, unless general or the ship be stranded; sugar, tobacco, hemp, flax, hides, and skins are warranted free from average under five pounds per cent; and all other goods, and also the ship and freight, are warranted free from average under three pounds per cent unless general or the ship be stranded."

In 1764 Lord Mansfield in *Wilson v. Smith*, 3 Burr. 1550, held that the word "unless" meant the same as "except," and that "the words 'free from average unless general' can never mean to leave the insurers liable to any particular average."

In *Cocking v. Fraser*, 4 Dougl. 295 (1785), the court of King's bench held, Lord Mansfield and Mr. Justice Buller speaking, that the insurer was secured against all damage to memorandum articles, unless they were completely and actually destroyed so as no longer physically to exist. * * *

The general rule is firmly established in this court that the insurers are not liable on memorandum articles, except in case of actual total loss, and that there can be no actual total loss where a cargo of such articles has arrived, in whole or in part, in specie, at the port of destination, but only when it is physically destroyed, or its value extinguished by a loss of identity. *Biays v. Chesapeake Ins. Co.* (1813) 7 Cranch, 415, 3 L. Ed. 389; *Marcadier v. Chesapeake Ins. Co.* (1814) 8 Cranch, 39, 3 L. Ed. 481; *Morean v. United States Ins. Co.* (1816) 1 Wheat. 219, 4 L. Ed. 75; *Hugg v. Augusta Ins. & Bkg. Co.* (1849) 7 How. 595, 12 L. Ed. 834; *Great Western Ins. Co. v.*

Fogarty (1873) 19 Wall. 640, 22 L. Ed. 216. And see *Robinson v. Commonwealth Ins. Co.*, 3 Sumn. 220, Fed. Cas. No. 11,949; *Marean v. United States Ins. Co.*, 3 Wash. C. C. 256, Fed. Cas. No. 9,064.

Biays v. Chesapeake Ins. Co. was a case of insurance upon hides, of which some were totally lost; some were saved in a damaged condition; and some were uninjured. This court overruled the contention that there could be a total loss as to some of them notwithstanding the memorandum clause, and Mr. Justice Livingston said:

"Whatever may have been the motive to the introduction of this clause into policies of insurance, which was done as early as the year 1749, and most probably with the intention of protecting insurers against losses arising solely from a deterioration of the article, by its own perishable quality; or whatever ambiguity may once have existed from the term average being used in different senses, that is, as signifying a contribution to a general loss, and also a particular or partial injury falling on the subject insured, it is well understood at the present day, with respect to such [memorandum] articles, that underwriters are free from all partial losses of every kind, which do not arise from a contribution towards a general average.

"It only remains, then, to examine, and so the question has properly been treated at bar, whether the hides, which were sunk, and not reclaimed, constituted a total or partial loss within the meaning of this policy. It has been considered as total by the counsel of the assured, but the court cannot perceive any ground for treating it in that way, inasmuch as out of many thousand hides which were on board, not quite 800 were lost, making in point of value somewhat less than one-sixth part of the sum insured by this policy. If there were no memorandum in the way, and the plaintiff had gone on to recover, as in that case he might have done, it is perceived at once that he must have had judgment only for a partial loss, which would have been equivalent to the injury actually sustained.

"But without having recourse to any reasoning on the subject, the proposition appears too self-evident not to command universal assent, that when only a part of a cargo, consisting all of the same kind of articles, is lost in any way whatever, and the residue (which in this case amounts to much the greatest part) arrives in safety at its port of destination, the loss cannot but be partial, and that this must forever be so so long as a part continues to be less than the whole. This loss, then, being a particular loss only, and not resulting from a general average, the court is of opinion that the defendants are not liable for it."

In *Marcardier v. Chesapeake Ins. Co.* some of the goods insured were warranted "free from average unless general," and damages were claimed for a constructive total loss of these goods, but the claim was disallowed. After stating the American rule that a damage of ordinary goods exceeding 50 per cent entitles the insured to recover for a constructive total loss, Mr. Justice Story continued:

"But this rule has never been deemed to extend to a cargo consisting wholly of memorandum articles. The legal effect of the memorandum is to protect the underwriter from all partial losses; and if a loss by deterioration, exceeding a moiety of value, would authorize an abandonment, the great object of the stipulation would be completely evaded. It seems, therefore, to be the settled doctrine that nothing short of a total extinction, either physical or in value, of memorandum articles at an intermediate port, would entitle the insured to turn the case into a total loss, where the voyage is capable of being performed."

In *Robinson v. Commonwealth Ins. Co.*, 3 Sumn. 220, Fed. Cas. No. 11,949, where a clause in the policy exempted the insurers from liability for any partial loss on goods esteemed perishable in their own nature, and the goods insured were held to be perishable, the same eminent judge charged the jury:

"The principle of law is very clear that, as this is an insurance on a perishable cargo, the plaintiff is not entitled to recover, unless there has been a total loss of the cargo by some peril insured against. If the schooner had arrived at the port of destination, with the cargo on board, physically in existence, the plaintiff would not have been entitled to recover, however great the damage might have been by a peril insured against, even if it had been 99 per cent. or, in truth, even if the cargo had there been of no real value."

Part of the cargo in *Morean v. United States Ins. Co.* was warranted free from average unless general, and Mr. Justice Washington said:

"All considerations connected with the loss of the cargo, in respect to quantity or value, may at once be dismissed from the case. As to memorandum articles, the insurer agrees to pay for a total loss only, the insured taking upon himself all partial losses without exception.

"If the property arrive at the port of discharge, reduced in quantity or value, to any amount, the loss cannot be said to be total in reality, and the insured cannot treat it as a total, and demand an indemnity for a partial, loss. There is no instance where the insured can demand as for a total loss, that he might not have declined an abandonment, and demand a partial loss. But if the property insured be included within the memorandum, he cannot, under any circumstances, call upon the insurer for a partial loss, and, consequently, he cannot elect to turn it into a total loss. * * * The only question that can possibly arise, in relation to memorandum articles is whether the loss was total or not; and this can never happen where the cargo, or a part of it, has been sent on by the insured, and reaches the original port of its destination. Being there specifically, the insurer has complied with his engagements; everything like a promise of indemnity against loss or damage to the cargo being excluded from the policy."

In *Hugg v. Augusta Ins. & Bkg. Co.* the insurance was upon freight on a cargo of jerked beef, perishable articles being warranted

free from average, and it was held that defendant was not liable for a total loss of freight, unless it appeared that the entire cargo was destroyed in specie. * * * Mr. Justice Nelson, delivering the opinion of the court, made these, among other, observations:

"What constitutes a total loss of a memorandum article has been the subject of frequent discussion both in the courts of England and this country, and in the former of some diversity of opinion; but in most of the cases the decisions have been uniform, and the principle governing the question regarded as settled; and that is, so long as the goods have not lost their original character, but remain in specie, and in that condition are capable of being shipped to the destined port, there cannot be a total loss of the article, whatever may be the extent of the damage, so as to subject the underwriter. The loss is but partial. * * *

"The only doubt that has been expressed in respect to the soundness of this rule is whether a destruction in value for all the purposes of the adventure, so that the objects of the voyage were no longer worth pursuing, should not be regarded as a total loss within the memorandum clause, as well as a destruction in specie. * * * In this country the rule has been uniform that there must be a destruction of the article in specie, as will be seen by a reference to the following authorities. * * *

"Whether the test of liability is made to depend upon the destruction in specie, or in value, would, we are inclined to think, as a general rule, make practically very little, if any, difference; for while the goods remain in specie, and are capable of being carried on in that condition to the destined port, it will rarely happen that on their arrival they will be of no value to the owner or consignee. The proposition assumes a complete destruction in value, otherwise the uncertainty attending it would be an insuperable objection; and, in that view, it may be a question even if the degree of deterioration would not be greater to constitute a total loss than is required under the present rule.

"The rule as settled seems preferable, for its certainty and simplicity, and as affording the best security to the underwriter against the strong temptation that may frequently exist, on the part of the master and shipper, to convert a partial, into a total, loss."

The case came up on a certificate of division, and the answer to the first question certified was:

"That, if the jury find that the jerked beef was a perishable article within the meaning of the policy, the defendants are not liable as for a total loss of the freight, unless it appears that there was a destruction in specie of the entire cargo, so that it had lost its original character at Nassau, the port of distress; or that a total destruction would have been inevitable from the damage received, if it had been reshipped before it could have arrived at Matanzas, the port of destination."

The cases in this court are reviewed and applied by Mr. Justice Miller in *Great Western Ins. Co. v. Fogarty*, in which it was ruled that, where certain machinery had been so injured as to have lost its identity as such, recovery for total loss might be sustained. * * *

It would subserve no useful purpose to attempt a review of the English cases on this subject. If in England a plaintiff may recover for a constructive total loss of memorandum articles, it is when they are so injured as to be of no substantial value when brought to the port of destination.

In the United States (and herein is a material difference between the jurisprudence of the two countries), the general rule is that a damage exceeding 50 per cent. justifies abandonment and recovery as for constructive total loss. *Marcadier v. Chesapeake Ins. Co.*, 8 Cranch, 39, 3 L. Ed. 481; *Le Guidon* (Paris, 1831) chap. VII. art. 1; chap. V. art. 8. But this principle is not applicable to memorandum articles in respect of which the exception of particular average excludes a constructive total loss.

There is no pretense here that this wire, with some small exceptions duly allowed for, did not exist at Key West, and did not arrive at Velasco in specie, and, as to a large part, with its original character unimpaired. Abandonment is necessary when the loss is only constructively total, and under this policy no right of abandonment existed at the time of the disaster or afterwards, by the exercise of which the assured could turn this partial loss in fact into a total loss by construction. * * * Affirmed.

IV. The Insurer's Liability—Total Loss ¹¹

JONES v. WESTERN ASSUR. CO.

(Supreme Court of Pennsylvania, 1901. 198 Pa. 206, 47 Atl. 948.)

Action by James Jones & Sons against the Western Assurance Company of Toronto, Ontario. From a judgment in favor of plaintiffs, defendant appeals.

MESTREZAT, J. This is an action of assumpsit brought to recover \$3,000, the full amount of a policy of marine insurance issued to the plaintiffs by the defendant on the steam towboat *Dauntless*. The policy is dated January 7, 1897, and ran for one year. There was another policy on the boat of like amount, and covering the same pe-

¹¹ For discussion of principles, see Vance on Insurance, §§ 225-227. See, also, Cooley, Briefs on the Law of Insurance, vol. 4, p. 2920 et seq.

riod, issued by the Eureka Fire & Marine Insurance Company of Cincinnati, Ohio. The policy issued by the defendant company fixed the value of the boat, by agreement of the parties, at \$8,000. It was a sternwheel vessel, and was used for towing purposes in the Ohio, Monongahela, and Allegheny rivers. In the early morning of March 8, 1897, the Dauntless was taken to McLaughlin's landing, on the Pittsburg side of the Allegheny river, and about three or four hundred yards above the exposition buildings, in the city of Pittsburg. It lay there for two hours, and about 6:30 o'clock it backed out from the landing, and started down the river with an empty flat in tow. The river was high, and the current was strong from the Pittsburg shore towards the Allegheny side of the river.

As the boat was proceeding down the river, and about 500 feet above the Union Bridge, which spans the Allegheny river at the point, the pilot, Capt. Clark, discovered that it was in a bad position. To avoid a collision with the bridge pier, he stopped, and began to back it up the river, and started to change the rudders. As the boat was backing the tiller line by which the rudders are controlled by the pilot parted, and it became helpless. In a couple of minutes it struck the Union Bridge pier, the second pier from the Pittsburg side. The boat struck on her right side, and a little back of the middle. After lodging there awhile, the engineer, by direction of the pilot, shoved the vessel off the pier, and it drifted down the river. It soon filled up pretty well with water, and after going 200 or 300 feet fell on the starboard side, and sank in about 14 or 15 feet of water, at the junction of the three rivers. This was about 7 o'clock in the morning. The plaintiffs placed watchmen in charge of the boat, who remained there a few days, until the defendant company took charge of it. The company was at once notified of the loss, and of the abandonment of the vessel. Proofs of the loss were also duly furnished.

The plaintiffs, claiming that the boat was a total loss, refused to assist in raising it. The defendant took charge of the boat, raised and repaired it, and on the 29th of June, 1897, tendered it to the plaintiffs, claiming that it had been restored to a better condition than it was just previous to the accident of March 8, 1897. At the same time the defendant presented the plaintiffs with a bill incurred in raising and restoring the Dauntless, accompanied by a demand for payment. The plaintiffs declined to receive the boat or to pay the bill, and brought this action.

The defendant company denied its liability to the plaintiffs for the amount of the policy, or any part of it, and interposed various defenses at the trial of the cause. The risks assumed by the company under the policy were the unavoidable dangers of rivers, of fires, and of jettisons, that should cause loss or damage to the vessel. There were specifically excepted from these risks "all perils, losses, or misfortunes arising from, or caused by, the gross negligence, recklessness,

or willful misconduct of the owner, master, officers, or crew of the vessel."

It was claimed on behalf of the defendant that the loss of the boat came within these exceptions; that the owners were guilty of gross negligence in not providing a proper and safe tiller rope; that the pilot was guilty of gross negligence in trying to change the rudders while the boat was backing, and in directing the engineer to shove it off the pier. These questions have been settled by the verdict. The learned judge below submitted them in a correct and very careful charge, and the jury has found against the contention of the defendant. The court, after referring to the testimony bearing upon the subject, told the jury that "if the owners were guilty of gross negligence in not providing proper machinery or a proper tiller rope, or if those in charge of the boat were guilty of gross negligence with reference to the collision or in getting the boat off the pier, then there can be no recovery."

It is further claimed that the plaintiffs neglected their duty by failing to comply with clause 5 of the policy after the vessel had sunk. This clause provides that, in case of loss, the assured shall use every effort for the safeguard and recovery of the vessel by employing such means as can be obtained for that purpose, and after recovery shall cause it to be repaired, but, in case of the neglect or refusal of the assured to do so, then the company may do it for account of the insured. In such case the company, after taking from the cost the deductions allowed in the policy in case of a partial loss, shall contribute to the cost of the repairs in the proportion that the sum insured bears to the agreed value. It is provided in the policy that the acts of the assured or assurers in saving or repairing the property insured shall be held not to be a waiver or acceptance of the abandonment or of an acknowledgment of liability by the assurers.

The learned court below thought that this clause should be construed in the light of, and in connection with, clause 8 of the policy, which provides that there shall be no abandonment as for a total loss, on account of the vessel grounding, unless the injury sustained (exclusive of the cost of raising, docking, and any other general average charges) shall be equivalent to 50 per cent. of the agreed value of the vessel. We think the court was clearly right in this view of the contract. He charged the jury that if the expense of repairing the boat was equal to, or greater than, the one-half of its value, then the plaintiffs had the right to abandon it, and the company could take possession of the boat, repair it, and sell it, or do what they pleased with it, and it would be their property; but that "if the assured unreasonably refused to join with the defendant in raising that boat, when it could be raised and repaired at a less expense than fifty per cent. of the agreed value,—that is, less than \$4,000,— then the plaintiffs could not recover the whole of this policy, and I will say to you that, if this is the case here, then there can be no recovery at all."

With a slight inaccuracy in regard to the expense of raising the vessel, hereafter referred to, we think the learned judge correctly determined the rights and liabilities of the parties under these clauses of the policy, and submitted the questions of fact arising thereon properly to the jury.

The day of the accident the plaintiffs notified the defendant of their loss, and the following day filed with them a marine protest. They placed a watch in charge of the wreck, and in three or four days the defendant's adjuster assumed control of it. The company raised and repaired it, and tendered it to the plaintiffs, alleging that the boat was then in a better condition than before it was injured. The plaintiffs, denying that such was its condition, refused to accept it. The learned judge in his charge said there was no provision in the policy directly providing for a tender back to the assured of the repaired vessel, but, notwithstanding the view thus entertained, he submitted to the jury to determine whether the boat was repaired so as to be as good as it was before the accident, and instructed the jury that if it was, and the plaintiffs refused to accept it, there could be no recovery. The plaintiffs might have objected to this part of the charge as holding them to the performance of an obligation not contained in their contract, but, surely, the defendant has no right to complain.

The next question that need be noticed is whether there was total loss, as contemplated in the eighth clause of the policy, which would justify an abandonment of the vessel. As we have seen, clause 8 of the policy provides that, when the injury sustained (exclusive of certain costs) is equal to 50 per cent. of the value of the vessel, a total loss shall exist justifying an abandonment. At the request of defendant, as contained in his fifth point, the court charged that this clause "must be interpreted as meaning that only the actual amount spent in repairs of the vessel shall be considered in calculating the 50 per centum of the total valuation of the vessel."

The defendant's contention is that the repairs amounted to \$3,339.65, as shown by its bill presented with the tender to the plaintiffs of the Dauntless after the vessel had been repaired. It was claimed by the defendant that with these repairs the boat was in a better condition than it was prior to the accident. On the other hand, this contention was met on the part of the plaintiffs by the allegation that when the vessel was tendered to them it was not in as good condition as it was prior to the accident, and to put it in such condition would require an additional expenditure of at least \$2,700. This would make, as claimed by the plaintiffs, the cost of repairing largely in excess of the \$4,000, 50 per centum of the value of the vessel. Each side presented testimony to sustain its contention in this respect, but it is not necessary to refer to it in detail, as we are of opinion that under it the jury was justified in finding against the defendant.

The sixth point alleges error by the court in including the expense of raising the boat in the 50 per cent. of its value required to make the total loss. That part of the charge is not accurate, but any error

that might have arisen from it was cured by the statements in other parts of the charge that the vessel could not be abandoned unless the cost of the repairing exceeded one-half the value of the boat, and the positive statement in the defendant's fifth point, which was affirmed by the court, that clause 8 of the policy "must be interpreted as meaning that only the actual amount spent in repairs of the vessel shall be considered in calculating the 50 per cent. of the total valuation of the vessel."

To summarize: The plaintiffs, alleging that it was impracticable to repair the boat within the terms of the policy, refused to assist in raising and repairing it, and abandoned the vessel. The company raised and repaired it, and, claiming that the repairs were less than one-half of its value, tendered the boat to the plaintiffs, and demanded payment of the plaintiffs' proportion of the cost of raising and repairing. Under proper instructions, the jury has found that the cost of the repairs did exceed the one-half of the value of the boat, and hence, under the provisions of the policy, there was a total loss. The plaintiffs were therefore justified in their action in abandoning the boat, and, of course, in claiming the full amount of their policy. The questions raised on the trial by the learned counsel for the defendant company were all submitted to the jury by the court, with substantially correct instructions. The offer to explain the policy by parol testimony was properly refused.

We see no error in the record requiring us to reverse the court below. The assignments of error are overruled, and the judgment is affirmed.

MURRAY v. GREAT WESTERN INS. CO.

(Supreme Court of New York, General Term, First Department, 1893. 72 Hun, 282, 25 N. Y. Supp. 414.)

Action by Joseph K. Murray, as trustee for mortgage bondholders of the steamship *Cleopatra*, against the Great Western Insurance Company, on a marine policy of insurance. From a judgment entered on a verdict in plaintiff's favor, and from an order denying a motion for a new trial, made on the minutes, defendant appeals.

FOLLETT, J.¹² This action was brought to recover on a marine policy of insurance, by which the defendant insured the *Cleopatra* against perils of the sea for one year from September 16, 1878, for \$9,000, under a policy in which the vessel was valued at \$75,000. The policy was taken out by and in the name of the owners of the ship; but, by an indorsement, the loss, if any, was made payable to the plaintiff, as trustee for certain mortgage bondholders. The vessel was also insured by other underwriters for \$38,000.

¹² Part of the opinion is omitted. Affirmed by the Court of Appeals, without opinion, 147 N. Y. 711, 42 N. E. 724.

The *Cleopatra* was a wooden steamship, of about 1,045 tons burden, built in 1865. In August, 1878, she was found to be considerably "hogged," both ends being lower than the center; and in that month she was repaired, strengthened, and supplied with new boilers. At this time, and at the time of the stranding, David Colden Murray, Lindley Murray Ferris, Jr., and Robert M. Ferris, constituting the firm of Murray, Ferris & Co., were the owners of $\frac{85}{100}$, and Sophus Valentine, the master, was the owner of $\frac{15}{100}$. To secure the payment of \$20,000, the cost of the repairs, Murray, Ferris & Co., September 18, 1878, mortgaged their interest in the ship to Joseph K. Murray, as trustee, to secure the payment of 40 bonds of \$500 each. The mortgagors stipulated in the mortgage to keep the vessel insured for \$25,000 for the benefit of the trustee. There was a prior mortgage of \$6,000 on the ship, held by Joseph K. Murray, individually, which he stipulated should become the second lien.

After the ship had been so repaired and insured, she made one round voyage between New York and Santiago de Cuba via Nassau and Cienfuegos without accident, and October 17, 1878, she left New York on a second round voyage between the same ports.

October 23, 1878, the vessel was stranded on a reef in Douglas channel, near Nassau, New Providence,—one of the Bahama islands. December 18, 1878, the owners gave the defendant written notice of the stranding, and that they abandoned the vessel to the insurers; and March 18, 1879, the plaintiff, as trustee, gave a like notice, in which the owners also joined.

It is conceded that the vessel was considerably injured by the accident, and the plaintiff asserts that he and the owners were justified in abandoning her, and that he is entitled to recover for a constructive total loss.

Besides the question of damages, the only issue of fact submitted to the jury (neither party requesting the submission of any other) was whether the vessel was so injured that it became a constructive total loss. This issue has been three times tried,—First, at special term, before Mr. Justice Donohue, where a judgment was rendered for the plaintiff; second, before a jury which disagreed; and, lastly, before the jury which rendered the verdict on which this judgment now under review was entered.

The policy provides: "And it is further agreed that, in case a total loss shall be claimed for or on account of any damage or charge to the said vessel, the only basis of ascertaining her value shall be her valuation in the policy."

The valuation clause in the policy is as follows:

"Hull and apparel valued at.....	\$37,500
Boilers and machinery valued at.....	37,500
<hr/>	
Total	\$75,000

"The valuation of hull, tackle, and apparel being made separate from that of the boilers and machinery, it is agreed that no abandonment of one interest, as valued, shall be made unless there shall be a total loss of the other."

It was further provided in the policy: "And, lastly, it is agreed that, in case of any claim for loss or damage, a deduction of one-third from the cost of repairing or replacing the same shall be made, after deducting the value of the old materials, except in the case of anchors, and of sheathing of copper and other metal; a deduction of one-fortieth from the expense of repairing or replacing the metal sheathing, or any part thereof (after first deducting the value of the old metal and nails) shall be made for every month since the vessel was last sheathed until the expiration of forty months, after which time the cost of remetalling or repairing the same shall be wholly borne by the assured. If a technical total loss shall be claimed, similar deductions shall be made from the estimated repairs, and, unless the net cost thereof would exceed a moiety of the value of the vessel after making such deduction, the loss shall be deemed partial, only."

The term "technical total loss" is used in the policy, which means the same as "constructive total loss." 2 Phil. Ins. 237; 2 Pars. Mar. Law, 336; 2 Pars. Mar. Ins. 110.

Mr. Arnould, in his learned work on Marine Insurance, (volume 2, [6th Ed.] p. 951,) defines the term "constructive total loss" as follows: "An absolute total loss takes place when the subject insured wholly perishes, or there is a privation of it, and its recovery is hopeless. A constructive total loss takes place when the subject insured is not wholly destroyed, but its destruction is rendered highly probable, or the privation of it, though not quite irretrievable, is such that its recovery is either exceedingly doubtful, or too expensive to be worth the attempt. An absolute total loss entitles the assured to claim from the underwriter the whole amount of his subscription. A constructive total loss entitles him to make such claim on condition of giving notice of abandonment of all right and title to any part of the property that may still exist, or may still be recovered." This definition by the courts and text-books. 3 Kent, Comm. 318; 2 Phil. Ins. 237; 2 Pars. Mar. Ins. 107, and cases cited.

The foregoing is the general rule, but in cases of injuries to vessels, and in the absence of stipulations in the policies on the subject, the courts of different jurisdictions do not agree as to the proportion which the cost of repairing must bear to the value of the ship, so as to justify an abandonment, and a claim for a constructive total loss. *Dickey v. Insurance Co.*, 4 Cow. 222, affirmed 3 Wend. 658, 20 Am. Dec. 763; *Suarez v. Insurance Co.*, 2 Sandf. 482, 2 Pars. Mar. Ins. 125 et seq.; 2 Arn. Mar. Ins. (6th Ed.) 952; *Irving v. Manning*, 1 H. L. Cas. 287. And the courts do not agree, in the absence of stipulations on the subject, whether the valuation in the policy, if the vessel be therein valued, or the value of the ship just before the in-

jury, or its value after reparation, should be taken as the basis in estimating the proportion of the cost of repairs to value. *Insurance Co. v. Ogden*, 20 Wend. 287; *Wallerstein v. Insurance Co.*, 44 N. Y. 204, 217, 4 Am. Rep. 664; *Insurance Co. v. Southgate*, 5 Pet. 604, 8 L. Ed. 243; *Deblois v. Insurance Co.*, 16 Pick. (Mass.) 303, 28 Am. Dec. 245; *Peele v. Insurance Co.*, 3 Mason, 27, Fed. Cas. No. 10,905; *Bradlie v. Insurance Co.*, 12 Pet. 378, 9 L. Ed. 1123; 3 Kent, Comm., 331; 2 Pars. Mar. Ins. 134; 2 Arn. Mar. Ins. (6th Ed.) 995, 1046, 1035, 1148.

In the case at bar, it is provided in the policy that a constructive total loss shall not be claimed unless the net cost of repairs, after making the deductions specified in the clause, exceed one-half of the value of the vessel. In this state the rule is that, in determining whether a ship is so far injured as to become a constructive total loss, its value as stated in the policy controls. *Insurance Co. v. Ogden*, supra; *Wallerstein v. Insurance Co.*, supra; 3 Kent, Comm. 331. This is also the rule in Massachusetts, (*Deblois v. Insurance Co.*, supra,) and in England, (*Irving v. Manning*, supra; 1 Arn. Mar. Ins. [6th Ed.] 301).

The supreme court of the United States holds that the actual value of the ship immediately before the accident is to govern. *Insurance Co. v. Southgate*, supra; *Bradlie v. Insurance Co.*, supra; 3 Kent, Comm. 331.

The learned trial judge instructed the jury in accordance with the rule of this state, which was acquiesced in at the trial by the litigants, and the accuracy of the instruction is not questioned by counsel on this appeal. Whether the extent of the injuries sustained by the vessel was sufficient to justify its abandonment, within the rule of this state, was a sharply-contested issue of fact, which the appellant insists was determined contrary to the weight of evidence. * * *

Was a legal abandonment effected? As before stated, the owners gave the defendant written notice of abandonment on the 18th of December, 1878, in which the plaintiff did not join. It is now asserted that the owners having mortgaged the vessel, and the insurance being payable by indorsement to the mortgagee, they were without power to make a legal abandonment. The mortgage is in the ordinary form, and contains, in form, an absolute conveyance of the title, with a defeasance. It recites that it is made to secure the payment of 40 bonds of \$500 each, with interest, and that when they are paid the mortgage shall be void. The mortgage further provides: "And, until default shall have been made by the parties of the first part in payment of said bonds, the parties of the first part shall be permitted to possess and use the said steamship and appurtenances, and to repair and renew the same, and to take and use the income thereof, and apply the same to the necessary current expenses and the purchase of necessary machinery and equipments, or dispose of the same for the legal uses of the mortgagors, in any manner not inconsistent

with this mortgage." It provides that, in case default shall be made in the performance of any of the mortgagors' covenants, the mortgagee may take possession of the vessel, and sell or dispose of the same at public or private sale. The mortgagors covenanted that they would keep the ship insured for at least \$25,000, and assign the assurances to the mortgagee as additional security.

A legal abandonment cannot be effected unless the person who assumes to make it has at the time of the loss the power to make a legal transfer of the property abandoned. 2 Pars. Mar. Ins. 119; 2 Arn. Mar. Ins. (6th Ed.) 956. In *Hunt v. Royal Exchange Assurance*, 5 Maule & S. 47, it was held that, where an insurance was effected by part of the owners, they might make a legal abandonment for all of the joint owners. In *Insurance Co. v. Stark*, 6 Cranch, 268, 3 L. Ed. 220, it was held that an agent who procured an insurance for his principal, and who abandoned the subject of the insurance, must, in the absence of evidence that he was without authority, be presumed to have had authority to make the abandonment. In *Gordon v. Insurance Co.*, 2 Pick. (Mass.) 249, 260, a vessel was insured in the name of the plaintiff, who was the owner. Afterwards, he executed an absolute bill of sale of the ship, which contained no defeasance. By the instrument the title to the property was not to re-vest in the plaintiff upon the performance of any condition. It was shown, however, on the trial, that the bill of sale was intended as security for the payment of debts due from the owner to the transferee. It was held that by virtue of the absolute transfer the plaintiff had divested himself of the legal title to, and dominion over, the property; could transfer none, and could not abandon it to the insurers. In *Bidwell v. Insurance Co.*, 19 N. Y. 179, the defendant insured a vessel on account of Crocker, the owner; the loss, if any, payable to Bidwell, the mortgagee. It was stated in the policy that there were no other liens upon the vessel. A loss occurred, and it turned out that there were two prior mortgages on the vessel. It was held that the insurance was of Crocker, the owner, upon the vessel, and not of Bidwell, upon his interest as mortgagee of Crocker's equity of redemption, and that the mortgagee could not recover on the policy. In the case at bar the insurance was of the interest of the owners, not of the interest of the mortgagee. In *Younger v. Insurance Co.*, 1 Spr. 236, Fed. Cas. No. 5,487, affirmed 2 Curt. 322, Fed. Cas. No. 5,487 it was held that the master of the vessel has not, by virtue of his office, authority to abandon her to the underwriters.

In all the cases the right to abandon turned on the power of the person tendering abandonment to transfer title to the subject of the insurance to the insurer. In the case at bar the owners had the undoubted right to transfer the vessel to the insurer, and therefore could effect a legal abandonment of her. In addition, the owners procured the insurance for the mortgagee, who subsequently, March

12, 1879, notified the defendant that the owners' notice of abandonment, of December 18, 1878, was given with his authority, and that he ratified and confirmed it. This brings the case within the principle of *Insurance Co. v. Stark*, supra. It appears in this case that June 20, 1878, the owners mortgaged the vessel to Joseph K. Murray to secure the payment of \$6,000, and June 21, 1878, to Murray to secure the payment of \$4,000, both mortgages falling due September 14, 1878. These mortgages are not in the case, and we are ignorant of their terms, nor do we know that they were unpaid when the vessel was stranded.

Was the abandonment timely? November 26, 1878, the second and final survey was made, and a notice of abandonment was served December 18, 1878. The case does not disclose how frequently mails were transmitted between Nassau and New York, nor whether there was telegraphic communication between those ports, although it appears inferentially from the letter of Murray, Ferris & Co., of November 15, 1878, put in evidence by the defendant, that Savannah was the nearest and most convenient telegraph station. In *Insurance Co. v. Stark*, Chief Justice Marshall, speaking for the court, said: "The law is settled that an abandonment, to be effectual, must be made in reasonable time; but what time is reasonable is a question compounded of fact and law, which has not yet been reduced to such certainty as to enable the court to pronounce upon it without the aid of a jury. Certainly, the delay may be so great as to enable every man to declare, without hesitation, that it is unreasonable, or the abandonment may be so immediate, that all will admit it to have been made in a reasonable time; but there may be such a medium between these extremes as to render it doubtful whether the delay has been reasonable or otherwise. If it was a mere question of law, which the court might decide, then the law would determine, to a day or an hour, on the time left for deliberation, after receiving notice of the loss. But the law has not so determined, and it therefore remains a question compounded of fact and law, which must be found by a jury under the direction of the court."

The defendant asked the court to decide, as a matter of law, that the abandonment was not made within a reasonable time, but made no request that any question of fact involved in that issue be determined by the jury, thus leaving the court to determine all questions and inferences of fact arising from the evidence bearing on this question. The facts, and inferences from them, having been found against the defendant, it is not apparent that the question of reasonable time was erroneously determined by the court. * * * Modified.

V. Abandonment¹³

MURRAY v. GREAT WESTERN INS. CO.

(Supreme Court of New York, General Term, First Department, 1893. 72
Hun, 282, 25 N. Y. Supp. 414.)

For a report of this case, see ante, p. 436.

¹³ For discussion of principles, see Vance on Insurance, § 228. See, also, Cooley, Briefs on the Law of Insurance, vol. 4, p. 2949 et seq.

ACCIDENT INSURANCE

I. Accidental Injuries—External, Violent, and Accidental Causes ¹

MARYLAND CASUALTY CO. v. HUDGINS.

(Court of Civil Appeals of Texas, 1903. 72 S. W. 1047.)

Action by Sallie N. Hudgins against the Maryland Casualty Company. Judgment for plaintiff, and defendant appeals.

RAINEY, C. J.² Suit on accident insurance policy issued by appellant to Wm. T. Hudgins, husband of appellee. Hudgins died November 1, 1900. * * *

The other issue raised by the assignments is that defendant is not liable under the terms of the policy, the evidence failing to show that death resulted from an accidental cause. The policy provided for indemnity in case of death sustained through "external, violent, and accidental means" independent of all other causes. It contained a clause which reads as follows: "This insurance does not cover disappearances, nor war risks, nor voluntary exposure to danger, unless incurred in an attempt to save human life, nor injuries received while attempting to board or alight from a moving conveyance propelled by steam, electricity, or cable (except that in case of injuries received while boarding or alighting from such conveyances while running at a rate of speed not greater than eight miles an hour, the assured shall be covered by clause 1 hereof), nor injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed or inhaled (anæsthetics administered by a regular physician excepted), nor injuries, fatal or otherwise, received while or in consequence of having been under the influence of or affected by or resulting directly or indirectly from intoxicants, narcotics, vertigo, sleepwalking, fits, hernia, or any disease or bodily infirmity. But it is understood this policy covers the assured according to the terms hereof in the event of his injury from freezing, sun-stroke, drowning, or choking in swallowing."

The evidence shows that on Sunday, October 28, 1900, the insured, his wife, and son were together at dinner at the Randolph Hotel, in Texarkana, Tex. The insured ordered raw oysters for himself and son. When he had eaten two and the son one, he said to his wife: "Don't let that child eat any more of those oysters. They

¹ For discussion of principles, see Vance on Insurance, § 232. See, also, Cooley, Briefs on the Law of Insurance, vol. 4, p. 3156 et seq.

² Part of the opinion is omitted.

are not sound. They are tough." He was taken sick that evening, complained of pains in his stomach, grew worse, and died the following Thursday, November 1, 1900. The unsound oysters produced the death of the insured by passing out of the large part of the stomach, lodging in the lower part of the stomach or upper intestine, inflaming the intestinal tract and mucous membrane, causing the same to enlarge, locking the bowels, obstructing and preventing passage, and thereby producing death. Said oysters contained no poison whatever of any description. The insured did not discover that the oysters were unsound until he had eaten the two, and then ate no more.

It is contended that the policy exempted the company from liability for "injuries, fatal or otherwise, resulting from poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled," and the act of the insured in eating the oysters falls within the terms of said provision; that he ate them voluntarily, consciously, and intentionally; therefore they were not "accidentally" taken. Construction of clauses in policies similar to the one here under consideration have been the subject of much dissension by the courts, and the opinions show a want of harmony in the views entertained. Some of the courts support the contention of appellant, while others of equal weight support the contention of appellee, in effect, that eating of the oysters not knowing they were unsound, he did not voluntarily eat unsound oysters, and death produced thereby was accidental.

The evidence clearly shows that the insured did not intend to eat unsound oysters. If such eating falls within the meaning of the word "accident," as that word is ordinarily defined and understood, then the proper judgment has been rendered in this case. "Death as the result of accident imports an external and violent agency as the cause." *Healey v. Association*, 133 Ill. 556, 25 N. E. 52, 9 L. R. A. 371, 23 Am. St. Rep. 637; *Miller v. Fidelity & Casualty Co. (C. C.)* 97 Fed. 836; *Association v. Alexander*, 104 Ga. 709, 30 S. E. 939, 42 L. R. A. 188; *Association v. Smith*, 29 C. C. A. 223, 85 Fed. 401, 40 L. R. A. 653; *Am. & Eng. Ency. Law*, vol. 1, 294-5. * * *

In *Association v. Barry*, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60, it is said: "If in the act which precedes the injury something unforeseen, unexpected, unusual occurs, which produces the injury, then the injury resulted through accidental means." In *Supreme Council Chosen Friends v. Garrigus*, 104 Ind. 133, 3 N. E. 822, 54 Am. Rep. 298, it is said: "The word 'accident,' as used in those laws and in the relief fund certificates held by members, should be given its ordinary and usual signification, as being an event that takes place without one's foresight or expectation." In *Carnes v. Association*, 106 Iowa, 281, 76 N. W. 683, 68 Am. St. Rep. 306, where death resulted from taking a dose of morphine, the court held that, if he took more than he intended, the death was accidental, but that, if he took the exact amount intended, and misjudged the effect, the death was not accidental.

It is true the insured knowingly ate the oysters, but he did not know that he was eating unsound oysters. The effect was not the natural and probable consequence of eating sound oysters, and the effect produced by the eating of the unsound oysters could not have been reasonably anticipated or foreseen by him. It was unexpected, unforeseen, and unusual, and therefore it cannot be said that he voluntarily ate the unsound oysters. This being true, his death was caused by "accidental means," as that term is used in the policy.

But it is insisted that, as the oysters were "taken," the company is exempted from liability under the terms of the policy. The defendant, in pleading its exemption from liability by reason of the claim under consideration, alleged that, if the oysters eaten caused the death, it was because they contained ptomaine poison, and therefore defendant was not liable. The court instructed the jury that, if the oysters contained ptomaine poison, to find for defendant. The jury found against this theory, and the evidence supports this finding. To avail itself of the exemption, defendant was bound to plead it and the facts applicable thereto, and, having done this, its defense will be confined to the matter pleaded, and it will not be heard on the contention that death resulted from something else other than poison taken.

If it should be conceded, however, that our position on this proposition is not sound—which we do not—we are still of the opinion that the word "anything" as used in the language "poison or anything accidentally or otherwise taken, administered, absorbed, or inhaled," does not refer to eating of food ordinarily harmless, not knowing it to be unsound and dangerous in that condition. It must be interpreted as having reference to those agencies which are not strictly denominated poison, but which have some elements of poison, and which may produce death if improperly taken. In *Kasten v. Interstate Casualty Co.*, 99 Wis. 73, 74 N. W. 534, 40 L. R. A. 651, where a similar clause was under consideration, the court say: "While the word 'poison,' as used in the policy, may be construed to mean liquids commonly known as poisons, it is followed by the words 'or anything,' which clearly indicates that the intent was to include under the entire term everything of a poisonous nature."

The evidence in this case showing that the death of the insured was not caused by the taking of poison or anything of a poisonous nature, but resulting from other accidental cause, the company is not exempt from liability. *Paul v. Insurance Co.*, 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758; *Menneily v. Assurance Corporation*, 148 N. Y. 597, 43 N. E. 54, 31 L. R. A. 686, 51 Am. St. Rep. 716; *Association v. Thomas (Ky.)* 17 S. W. 275; *Association v. Alexander*, 104 Ga. 709, 30 S. E. 939, 42 L. R. A. 188; *Association v. Smith*, 29 C. C. A. 223, 85 Fed. 401, 40 L. R. A. 653; *Fidelity & Casualty Co. v. Waterman*, 161 Ill. 632, 44 N. E. 283, 32 L. R. A. 654; *Penfold v. Insurance Co.*, 85 N. Y. 322, 39

Am. Rep. 660; Ins. Co. v. Dunlap, 160 Ill. 642, 43 N. E. 765, 52 Am. St. Rep. 355; Pickett v. Ins. Co., 144 Pa. 79, 22 Atl. 871, 13 L. R. A. 661, 27 Am. St. Rep. 618.

The judgment is affirmed.³

WESTERN COMMERCIAL TRAVELERS' ASS'N v. SMITH.

(Circuit Court of Appeals of United States, Eighth Circuit, 1898. 85 Fed. 401, 29 C. C. A. 223, 40 L. R. A. 653.)

In Error to the Circuit Court of the United States for the Eastern District of Missouri.

Before SANBORN and THAYER, Circuit Judges, and PHILIPS, District Judge.

SANBORN, Circuit Judge.⁴ The Western Commercial Travelers' Association, the plaintiff in error, has sued out a writ to reverse a judgment against it upon a certificate of insurance against accident which it issued to Freeman O. Smith, one of its members, for the benefit of Sarah I. Smith, the defendant in error. A jury was waived, the court tried the case and made a special finding of the facts, and the error assigned is that the facts found do not support the judgment (1) because they show that immediate notice of the accident or injury was not given to the association, as required by the policy, and (2) because they fail to show that the death of the member was produced "by bodily injuries effected by external, violent, and accidental means." * * *

In the latter part of August, 1895, while this certificate was in force, Freeman O. Smith, who was a strong and healthy man, commenced wearing a pair of new shoes. About September 6, 1895, the friction of one of the shoes against one of his feet, unexpectedly and without design on his part, produced an abrasion of the skin of one of his toes. He gave the abrasion reasonable attention, but it nevertheless caused blood poisoning about September 26, 1895, which resulted in his death on October 3, 1895. * * *

It is earnestly contended, however, that the death was not caused by bodily injuries effected by external, violent, and accidental means (1) because the disease of blood poisoning was the cause, and the abrasion of the skin of the toe was only the occasion, the locality in which the disease first appeared, and (2) because the abrasion of the skin was not an accident, but was made in the ordinary course of things. The contract does not differ, in respect to the subject presented by this proposition, from those which have been repeatedly considered by this court, and we state its legal effect briefly, because the reasons and authorities in support of our views here have been

³ Rehearing denied March 21, 1903.

⁴ Part of the opinion is omitted.

frequently set forth in the opinions of this court which are cited below.

If the death was caused by disease, without any bodily injury inflicted by external, violent, and accidental means, as in the case of the malignant pustule (*Bacon v. Association*, 123 N. Y. 304, 25 N. E. 399, 9 L. R. A. 617, 20 Am. St. Rep. 748), and as in the case of sunstroke (*Sinclair v. Assurance Co.*, 3 El. & El. 478; *Dozier v. Casualty Co.* [C. C.] 46 Fed. 446, 13 L. R. A. 114), the association was free from liability by the express terms of the certificate. If the deceased suffered an accident, but at the time he sustained it he was already suffering from a disease or bodily infirmity, and if the accident would not have caused his death if he had not been affected by the disease or infirmity, but he died because the accident aggravated the disease, or the disease aggravated the effects of the accident, as in the case of the insured who was subject to such a bodily infirmity that a short run, followed by stooping, which would not have injured a healthy man, produced apoplexy (*Insurance Co. v. Selden*, 24 C. C. A. 92, 78 Fed. 285), the association was exempt from liability, because the death was caused partly by disease and partly by accident. If the death was caused by bodily injuries effected by external, violent, and accidental means alone, the association was liable to pay the promised indemnity. If the death was caused by a disease which was not the result of any bodily infirmity or disease in existence at the time of the accident, but which was itself caused by the external, violent, and accidental means which produced the bodily injury, the association was equally liable to pay the indemnity. In such a case, the disease is an effect of the accident, the incidental means produced and used by the original moving cause to bring about its fatal effect, a mere link in the chain of causation between the accident and the death, and the death is attributable, not to the disease, but to the *causa causans*, to the accident alone. *Insurance Co. v. Melick*, 27 U. S. App. 547, 560, 561, 12 C. C. A. 544, 552, and 65 Fed. 178, 186; *Railway Co. v. Callaghan*, 12 U. S. App. 541, 550, 6 C. C. A. 205, 210, and 56 Fed. 988, 994; *Railway Co. v. Kellogg*, 94 U. S. 469, 475, 24 L. Ed. 256; *Association v. Shryock*, 36 U. S. App. 658, 663, 20 C. C. A. 3, 5, and 73 Fed. 774, 776.

Now, the finding of the facts made by the trial court is conclusive in this case, and the only question here presented is whether those facts warrant the judgment below. That court has found that the deceased was an exceptionally strong and healthy man when the abrasion in question was produced. It has found that the wearing of the new shoe produced the abrasion on September 6, 1895, that this abrasion was the cause of blood poisoning on September 26, 1895, and that the blood poisoning produced the death on October 3, 1895. The question whether the death was produced by the abrasion or by the disease is, therefore, extracted from this case. There is no ground for the contention that the disease of blood poisoning was

an intervening and independent cause of the death, because the finding of the court below is that that disease was a mere link in the chain of causation between the abrasion which produced it and the death which it produced.

The only question remaining, therefore, is whether or not the abrasion of the skin of the toe was produced by accidental means. If it was, the death was so produced; and if it was not, there was no accident, and consequently no cause of action. The contract was that the association would pay the promised indemnity for any death caused "by bodily injuries effected by external, violent, and accidental means." There is no claim that the friction of the shoe which caused the abrasion was not external and violent. The contention is that it was not accidental. The significance of this word "accidental" is best perceived by a consideration of the relation of causes to their effects. The word is descriptive of means which produce effects which are not their natural and probable consequences. The natural consequence of means used is the consequence which ordinarily follows from their use,—the result which may be reasonably anticipated from their use, and which ought to be expected. The probable consequence of the use of given means is the consequence which is more likely to follow from their use than it is to fail to follow. An effect which is the natural and probable consequence of an act or course of action is not an accident, nor is it produced by accidental means. It is either the result of actual design, or it falls under the maxim that every man must be held to intend the natural and probable consequence of his deeds. On the other hand, an effect which is not the natural or probable consequence of the means which produced it, an effect which does not ordinarily follow and cannot be reasonably anticipated from the use of those means, an effect which the actor did not intend to produce and which he cannot be charged with the design of producing under the maxim to which we have adverted, is produced by accidental means. It is produced by means which were neither designed nor calculated to cause it. Such an effect is not the result of design, cannot be reasonably anticipated, is unexpected, and is produced by an unusual combination of fortuitous circumstances; in other words, it is produced by accidental means. *Railway Co. v. Elliott*, 12 U. S. App. 381, 386, 387, 389, 5 C. C. A. 347, 350, 351, 353, 55 Fed. 949, 952, 953, 955.

Was the abrasion of the skin of the toe of the deceased the natural and probable consequence of wearing new shoes? It must be conceded that new shoes are not ordinarily worn with the design of causing abrasions of the skin of the feet, and the trial court has found that the abrasion upon the toe of the deceased was produced unexpectedly, and without any design on his part to cause it. An abrasion of the skin, certainly, is not the probable consequence of the use of new shoes; for it cannot be said to follow such use more frequently than it fails to follow it. Nor can such an abrasion be

said to be the natural consequence of wearing such shoes,—the consequence which ordinarily follows, or which might be reasonably anticipated. How, then, can it fail to be the chance result of accidental means,—means not designed or calculated to produce it? If the deceased, without design, had slipped, and caused an abrasion of his skin, as he was walking down the street, or had punctured the skin of his foot by stepping on a nail in his room, or had pierced it with a nail in his shoe as he was drawing it upon his foot, there could have been no doubt that these injuries were produced by accidental means; and it is difficult to understand why an abrasion of the skin, produced unexpectedly and without design, by friction caused by wearing a new shoe, does not fall within the same category.

In *McCarthy v. Insurance Co.*, 8 Biss. 362, Fed. Cas. No. 8,682, it is held that death from the rupture of a blood vessel caused by swinging Indian clubs for exercise may be a death from bodily injury caused by accidental means. In *Martin v. Insurance Co.*, 1 Fost. & F. 505, a total disability caused by straining the back while lifting a heavy burden was declared to be a disability produced by accident. In *Insurance Co. v. Burroughs*, 69 Pa. 43, 51, 8 Am. Rep. 212, the court said that an accident is “an event that takes place without one’s foresight or expectation; an event which proceeds from an unknown cause, or is an unusual effect of a known cause, and therefore not expected; chance; casualty; contingency,”—and held that a strain of the abdominal muscles, produced by pitching hay, which caused an inflammation that resulted in death, was an accident. Death by drowning, by involuntarily inhaling illuminating gas, or by fright is death by accidental means. *Trew v. Assurance Co.*, 6 Hurl. & N. 839; *Mallory v. Insurance Co.*, 47 N. Y. 52, 7 Am. Rep. 410; *Paul v. Insurance Co.*, 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758; *McGlinchey v. Casualty Co.*, 80 Me. 251, 14 Atl. 13, 6 Am. St. Rep. 190.

In *Insurance Co. v. Melick*, 27 U. S. App. 547, 12 C. C. A. 544, and 65 Fed. 178, this court affirmed a judgment based upon a verdict that a death caused by lockjaw, which was produced by a shot wound unexpectedly inflicted upon himself by the deceased, without design, was a death caused by bodily injury produced by accidental means alone. In *Association v. Barry*, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60, three persons jumped from the same platform at the same time and place. Two of them alighted in safety, while the third suffered a stricture of the duodenum which produced a disease which caused his death. The supreme court affirmed a judgment founded upon a verdict that his death was the result of bodily injuries effected through external, violent, and accidental means, and approved an instruction to the jury that: “The term ‘accidental’ was used in the policy in its ordinary, popular sense, as meaning ‘happening by chance; unexpectedly taking place; not according to

the usual course of things; or not as expected'; that, if a result is such as follows from ordinary means, voluntarily employed, in a not unusual or unexpected way, it cannot be called a result effected by accidental means; but that if, in the act which precedes the injury, something unforeseen, unexpected, unusual occurs, which produces the injury, then the injury has resulted through accidental means."

We are unable to distinguish the case at bar from those to which we have referred, and the case last cited is of controlling authority in this court. The abrasion of the skin of the toe of the deceased was unexpectedly caused, without design on his part, by unforeseen, unusual, and unexpected friction in the act of wearing the shoe which preceded the injury. It was not the natural or probable consequence of that act, and it was, therefore, produced by accidental means.

The judgment below must be affirmed, with costs; and it is so ordered.⁵

II. External and Visible Signs of Injury⁶

UNION CASUALTY & SURETY CO. v. MONDY.

(Court of Appeals of Colorado, 1903. 18 Colo. App. 395, 71 Pac. 677.)

Action by Bertha Mondy and others against the Union Casualty & Surety Company. Judgment for plaintiffs. Defendant appeals.

GUNTER, J.⁷ * * * The complaint alleges that insured, in discharging his duties as porter upon a sleeping car, was accidentally struck upon the head by the falling of a berth, and from the injuries so sustained died. These allegations the answer denies. * * *

The principal fact here was the injured condition of the insured. There was evidence of this other than his declarations made to the witnesses Carter and Stafford. He was a sound, healthy man, discharging his duties as porter. The train entering the town of Davisville made a sudden, violent, and unusual stop, the jar resulting to passengers from the stop being so violent as to alarm them. Immediately thereafter insured was seen standing at a berth partially made down, his foot upon the stepping stool, his head between his

⁵ Accord: *United States Mutual Accident Ass'n v. Barry*, 131 U. S. 100, 9 Sup. Ct. 755, 33 L. Ed. 60 (1889); *French v. Fidelity & Casualty Co.*, 135 Wis. 259, 115 N. W. 869, 17 L. R. A. (N. S.) 1011 (1908). For a discussion of the rule as to proximate and remote cause, see, also, Cooley, *Briefs on the Law of Insurance*, vol. 4, p. 3175.

⁶ For discussion of principles, see *Vance on Insurance*, § 234. See, also, Cooley, *Briefs on the Law of Insurance*, vol. 4, p. 3184.

⁷ Part of the opinion is omitted.

hands, and in great pain. He continued in great pain, his face and complaints showing pain. His head was tied up with a wet towel, and in his suffering he was put to bed in the smoking room. This was the night of October 26th. He remained in bed in the car, sick and suffering, until he arrived at home (Denver) October 29th. He there went to bed, called a physician, and remained under his care until death—November 11th. An autopsy was then made, showing a congested condition of the brain on the right side, and that from this he died. He was found to have been a strong, healthy man; every organ, even in death, was healthy and in good condition. There was no symptom of any disease from which the congested condition of the brain could arise. Dr. McNaught, who attended the insured continuously after his arrival in Denver, and who participated in the autopsy, testified that the probable cause of the congested condition of the brain was an injury. These facts showed that insured was suddenly changed from the state of health to one of sickness and pain; they showed the principal fact, the injured condition of the insured.

* * *

The policy provided: "This insurance does not cover * * * any injury, fatal or otherwise, of which there is no visible mark upon the body." Appellant contends that there was no evidence of a visible mark of the alleged injury upon the body of deceased. The jury in effect found that deceased was accidentally struck upon the head by the falling of an upper berth of a sleeping car, and that the injury so produced was the cause of his death. It was the purpose of defendant in issuing this policy, and the purpose of deceased in taking it out, to have the policy cover accidents of the character of the one here involved. The purpose of the provision of the policy thus cited was not to exclude accidents of the character before us, but to prevent the defendant from being imposed upon by fictitious accidents claimed to be within the policy. If the accident was intended by the parties to be within the policy, such a strained construction should not be put upon it as to exclude the accident and defeat the intention of the parties. The policy of the courts is to give a liberal construction to such provisions in favor of the insured. *Travelers' Ins. Co. v. Murray*, 16 Colo. 296, 305, 26 Pac. 774, 25 Am. St. Rep. 267; *U. S. Mutual Acc. Ass'n v. Newman*, 84 Va. 52, 59, 3 S. E. 805.

In *Mutual Accident Association v. Barry*, 131 U. S. 100, 111, 9 Sup. Ct. 755, 759, 33 L. Ed. 60, the policy provided that it should not extend to any injury of which there was no external and visible sign. The trial court, in charging, said: "It is true there must be an external and visible sign of the injury, but it does not necessarily follow from that that the injury must be external. That is not the meaning or construction of the certificate. Such an interpretation of the contract would, in the opinion of the court, sacrifice substance to shadow, and convert the contract itself into a snare—an instrument

for the destruction of valuable rights. Visible signs of injury, within the meaning of this certificate, are not to be confined to broken limbs, or bruises on the surface of the body. There may be other external indications or evidence which are visible signs of internal injury. Complaint of pain is not a visible sign, because pain you cannot see. Complaint of internal soreness is not such a sign, for that you cannot see, but if the internal injury produces, for example, a pale and sickly look in the face, if it causes vomiting or retching, or bloody or unnatural discharges from the bowels, if, in short, it sends forth to the observation of the eye, in the struggle of nature, any signs of the injury, then those are external and visible signs, provided they are the direct results of the injury." The insured sustained duodenitis by jumping from an elevated platform. The external and visible signs of bodily injury were that he was ill immediately after the injury, distressed in the stomach, vomited, and from that time retained nothing on his stomach, passed nothing but decomposed bloody mucus, and died nine days thereafter. By sustaining the recovery below, the upper court held these to be external and visible signs of bodily injury.

In *Pennington v. Pacific Mutual Life Ins. Co.*, 85 Iowa, 468, 470, 52 N. W. 482, 483, 39 Am. St. Rep. 306, plaintiff, a locomotive fireman, while on duty, was violently and accidentally injured by the lurching of a locomotive. He recovered upon an accident policy. This provided: "The insurance shall not cover * * * injuries of which there is no visible, external mark upon the body of the insured." The injury sustained was a strain. It was contended the accident was without the policy, because there was no visible mark of the injury upon the body. The court held: "The contract does not contemplate that there must be bruises, contusions, or lacerations on the body, or broken limbs." An effect of the strain was the disabled condition of insured. It was held that this was a visible, external mark of the injury upon the body of the insured.

In *Freeman v. Mercantile Accident Ass'n*, 156 Mass. 351, 30 N. E. 1013, 17 L. R. A. 753, the policy provided "that benefit under this certificate shall not extend to any case in which there shall be no symptom or visible sign of bodily injury." The insured died of peritonitis, localized in the region of the liver. The trial court was asked by the defendant to charge there must be an external sign of the bodily injury. This it declined to do, and charged that if there were symptoms or signs which would become visible, and did become visible, upon examination, by being able to inspect the interior of the body, it would be sufficient whether that examination was made before or after death. This was approved by the upper court.

Thayer v. Standard Life and Accident Insurance Company, 68 N. H. 577, 41 Atl. 182, was upon an accident policy; recovery by plaintiff, the facts being: Plaintiff's shoulder was accidentally injured by a fall, causing pain, and depriving him of the use of the arm. He

was disabled thereby from attending to business. The policy provided that it should not cover "any injury, fatal or otherwise, of which there is no visible mark upon the body." Construing this provision, the court said: "The visible mark upon the body required by the policy need not be a bruise, contusion, laceration, or broken limb, but may be any visible evidence of an internal strain which may appear within a reasonable time after the injury received."

In *U. S. Mutual Accident Ass'n v. Newman*, 84 Va. 52, 54, 62, 3 S. E. 805, 809, the policy provided "that benefits under this certificate shall not extend to any bodily injury of which there shall be no external, visible sign upon the body of the insured." It was held that death of the body was an external and visible sign of bodily injury upon the body of the insured.

We think death of the body of the insured was a visible mark of injury upon the body, within the meaning of the policy. Further, there was evidence of a localized redness of the tissues of the brain of deceased on the right side of the head. This was not revealed until the autopsy. This, we think, was a visible mark upon the body as provided in the policy. The terms of the policy did not require that the visible mark should be upon the surface of the body. * * * Affirmed.⁸

III. Poison or Contact with Poisonous Substances⁹

MARYLAND CASUALTY CO. v. HUDGINS.

(Court of Civil Appeals of Texas, 1903. 72 S. W. 1047.)

For report of this case, see ante, p. 443.

⁸ In *Horsfall v. Pacific Mut. Life Ins. Co.*, 32 Wash. 132, 72 Pac. 1028, 63 L. R. A. 425, 98 Am. St. Rep. 846 (1903), where the insured was injured by strain in lifting a heavy iron bar, it was said: "It is also urged that the injuries causing death left no visible external mark. * * * The evidence shows that immediately after the accident the deceased became deathly pale and sick, his hands and feet became cold, and the perspiration stood out on his face and hands. The next day after the accident his skin, which previously had been ruddy, became a bluish gray color, and remained so until his death. These, we think, were visible external marks, and sufficient to bring the case within the terms of the policy." See, also, *Menneilley v. Employers' Liability Assurance Corp.*, post, p. 696.

⁹ For discussion of principles, see Vance on Insurance, § 237. See, also, Cooley, *Briefs on the Law of Insurance*, vol. 4, p. 3193.

IV. Inhaling Gas ¹⁰

MENNEILLEY v. EMPLOYERS' LIABILITY ASSUR. CORP.

(Court of Appeals of New York, 1896. 148 N. Y. 596, 43 N. E. 54, 31 L. R. A. 686, 51 Am. St. Rep. 716.)

Action by Mary Menneille^{ci}y against the Employers' Liability Assurance Corporation, Limited, to recover on a policy. From an order of the general term (72 Hun, 477, 25 N. Y. Supp. 230) denying plaintiff's motion for judgment in her favor, ordered by the trial court subject to the opinion of the general term, and dismissing the complaint, plaintiff appeals.

The facts in this case were agreed upon by the parties, and were as follows: "That on the 12th day of October, 1891, during the continuance of the said policy of insurance, Samuel D. W. Menneille^{ci}y, the person mentioned in the complaint as the person insured in and by said policy of insurance, died. That at the time of his death he was stopping as a guest at the Millard Hotel, in Omaha, Neb. That he went to his room in said hotel on the night of the said 12th day of October, 1891, and at some time after he went to his room the illuminating gas therein accidentally escaped into his room. That early in the morning of the 13th day of October, 1891, the said Menneille^{ci}y was found in his bed, his room being tightly closed on the inside, and filled with such illuminating gas. That the death of said Menneille^{ci}y was occasioned by accidental means, and arose from and was caused by his involuntarily and accidentally breathing into his lungs the said illuminating gas, which had so accidentally escaped into such room, the escape of said gas being immediately discoverable upon entering said room, in consequence of which inspiration of said gas he died the same night of asphyxia. That the accident from which said Menneille^{ci}y died caused no external and visible marks, and the body of said Menneille^{ci}y bore no external and visible marks of the accident on account of which he died, unless the facts that illuminating gas emanated from his body when artificial respiration was produced, to the perception of the person producing such artificial respiration; that the room, on entering the same, was easily perceived to be full of illuminating gas, and that the gas was then escaping therein; and that inspection of the body showed life to be extinct,—be held or found to constitute such external and visible marks, within the meaning of the term 'external and visible marks,' contained in the policy. The defendant does not admit that such

¹⁰ For discussion of principles, see Vance on Insurance, § 238. See, also, Cooley, Briefs on the Law of Insurance, vol. 4, p. 3196.

facts constitute 'external and visible marks,' within the meaning of the term 'external and visible marks,' contained in the policy. The plaintiff claims that they do."¹¹ * * *

MARTIN, J. This action is upon a policy or contract of insurance issued by the defendant to Samuel D. W. Menneilley, by which, in case of his death from any accident within the provisions of the policy, the defendant agreed, within three months thereafter, to pay to the plaintiff the sum of \$5,000.

The conditions contained in the policy, so far as applicable to the questions involved in this case, are as follows: "This policy does not insure against death or disablement * * * from accidents that shall bear no external and visible marks, * * * nor against death or disablement arising from anything accidentally taken, administered, or inhaled, contact of poisonous substances, inhaling gas, or any surgical operation or exhaustion consequent thereon." The general term held that the clause in the policy which provides that it does not insure against death or disablement arising from anything accidentally taken, administered, or inhaled, described an act that was not voluntary and intelligent, but accidental, and that the admitted facts bring this case within that exception. That court also held that the facts did not establish a case within the exception as to inhaling gas; citing the decision of *Paul v. Insurance Co.*, 112 N. Y. 472, 20 N. E. 347, 3 L. R. A. 443, 8 Am. St. Rep. 758.

Thus, the sole ground upon which judgment was directed for the defendant was that it was not liable because the cause of the death of the insured was within the exception in the policy as to death arising from anything accidentally taken, administered, or inhaled. Moreover, the respondent admits that in this state, under the authority of the Paul Case, the words "inhaling gas," contained in the policy, when read in the light of the context, apply only to cases where gas is inhaled intentionally, voluntarily, and consciously, and that under the decision in that case the judgment of the general term cannot be upheld on the theory that that provision exempted the defendant from liability under its policy. In the Paul Case, Judge Gray, in delivering the opinion of the court, said: "But, in expressing its intention not to be liable for death 'from inhaling of gas,' the company can only be understood to mean a voluntary and intelligent act by the insured, and not an involuntary and unconscious act. Read in that sense, and in the light of the context, these words must be interpreted as having reference to medical or surgical treatment, in which *ex vi termini*, would be included the dentist's work, or to a suicidal purpose. Of course, the deceased must have, in a certain sense, inhaled gas; but, in view of the finding that the death was caused by accidental means, the proper meaning of words compels, as does the logic of the thing, the conclusion that there was not

¹¹ Statement of facts is abridged.

that voluntary or conscious act necessarily involved in the process of inhaling." In that case it was distinctly held that the defendant was not exempt from liability under such a provision where the death of the insured was caused by the accidental inhaling of illuminating gas.

The acts in that case were so nearly like those in the case at bar that no distinction between them exists. The Paul Case was referred to in *Bacon v. Association*, 123 N. Y. 304, 308, 25 N. E. 399, 9 L. R. A. 617, 20 Am. St. Rep. 748, and its doctrine expressly recognized as correct. It was also followed in *Pickett v. Insurance Co.*, 144 Pa. St. 79, 91, 22 Atl. 871, 13 L. R. A. 661, 27 Am. St. Rep. 618. It follows that the judgment appealed from cannot be sustained upon the ground that the clause in the policy excepting death from inhaling gas from its provisions exempts the defendant from liability in this case.

The respondent, however, urges that upon the admitted facts the general term properly held that the provision with reference to "anything accidentally taken, administered, or inhaled," exempted the company from any liability whatever under its policy. We think otherwise. That provision in the policy clearly implies voluntary action on the part of the insured, or some other person. The insured must take or inhale, or another must administer. The manifest purpose of the provision is to exempt the insurer from liability where the insured has voluntarily and consciously, but accidentally, taken or inhaled, or something has been voluntarily administered which was injurious or destructive of life. We think that the particular accidents intended to be excepted by that provision are the accidental taking or inhaling into the system of some injurious or destructive agency under the mistaken belief that it was beneficial, or, at least, harmless. That is made more apparent by that portion of the provision which relates to something "administered," as it cannot be reasonably construed as referring to a thing involuntarily and unconsciously administered. Indeed, it is quite difficult to understand how a thing could be involuntarily and unconsciously administered. Coupled together as these provisions are, the same rule of construction must be applied to that portion which relates to something accidentally inhaled as applies to the portion which relates to a substance accidentally taken or accidentally administered. All the cases thus provided for plainly involve voluntary and conscious action on the part of the insured, or some other person. The leading and controlling idea in this provision is the performance of a voluntary act which accidentally causes the death or injury of the insured.

That a proper construction of the policy requires us to hold that it applies only to cases where something has been voluntarily and intentionally, although mistakenly taken, administered, or inhaled, there can, we think, be but little doubt. As thus construed, this provision, manifestly, did not exempt the defendant from liability in this case.

as it was admitted that the death of the insured was occasioned by accidental means, and was caused by involuntarily and accidentally breathing illuminating gas which had escaped into the room where he was sleeping at the time of his death. The argument that the provision as to inhaling gas has been given the same effect as is now given to the other and more general one, and that such could not have been their purpose, has little force. The inhaling of gas having been specially provided for when taken for surgical and like purposes, it is only when it is inhaled for some other purpose, or under other circumstances, that the general provision applies. The special provision is applicable when gas is inhaled for surgical and like purposes. The general provision applies when it is inhaled for other purposes. Applying to the construction of this policy, the principles stated in the opinion in the Paul Case, it is obvious that the construction we have placed upon the policy is the proper and correct one.

The only remaining question relates to the provision which declares that the policy "does not insure against death or disablement * * * from accidents that shall bear no external and visible marks." It is somewhat difficult to understand precisely what was intended by this clause of the policy. We are, however, of the opinion that the language employed, when fairly construed, indicates that its purpose was to provide that a case of death or injury should not be regarded as within the policy unless there was some external or visible evidence which indicated that it was accidental; in other words, that only such injury as could be shown by external and visible evidence to have been accidental should be regarded as within the policy.

In this case it is admitted that the decedent's death was occasioned by his involuntarily and accidentally breathing illuminating gas which had accidentally escaped into his room; that there were no visible marks of the accident upon the body of the deceased, but, when artificial respiration was produced, illuminating gas emanated therefrom to the perception of the person producing such artificial respiration; that upon entering the room it was perceived to be full of gas, and that gas was then escaping therein; and that an inspection of the body showed life to be extinct. We think this admission furnishes sufficient evidence of an external and visible character that the death of the decedent was accidental to exclude it from this exception in the policy, and hence that it was one of the accidents against which the defendant intended to insure. The respondent discusses this question upon the theory that this clause in the policy should be construed as though it read, "From accident where there shall be no external and visible marks upon the body of the deceased." A fair construction of the language does not, we think, justify the conclusion that such was its intent and purpose, but that the more reasonable construction is that which has already been suggested.

If we are correct in these conclusions, it follows that the judgment of the general term should be reversed, and the judgment upon the

verdict directed for the plaintiff should be affirmed, with costs to the plaintiff in all the courts. All concur, except ANDREWS, C. J., not voting, and HAIGHT, J., not sitting. Judgment accordingly.

V. Voluntary and Unnecessary Exposure to Injury ¹²

DIDDLE v. CONTINENTAL CASUALTY CO.

(Supreme Court of Appeals of West Virginia, 1909. 65 W. Va. 170, 63 S. E. 962, 22 L. R. A. [N. S.] 779.)

Action by Lydia Diddle against the Continental Casualty Company. Judgment for plaintiff, and defendant brings error.

POFFENBARGER, J.¹³ Thomas D. Diddle, insured for the benefit of his wife, Lydia Diddle, in the Continental Casualty Company, for \$2,000, was struck by a railway water column, while riding on a railway engine, and killed. His wife brought this action on the policy and recovered a judgment for the sum of \$2,049.30. The defense was predicated on a limited liability clause in the policy, reading as follows: "Where the accident or injury results from voluntary exposure to unnecessary danger or obvious risk or injury, or from the intentional act of the insured or of any other person; * * * or (2) where the accidental injury results from or is received while quarreling, fighting or violating the law: * * * Then and in all cases referred to in this part 3, the amount payable shall be one-tenth of the amount which otherwise would be payable under this policy, anything in this policy to the contrary notwithstanding, and subject otherwise to all the conditions in this policy contained." Deeming this clause applicable and controlling, under the circumstances attending the death of the assured, the insurance company tendered the beneficiary \$200, one-tenth of the amount of the policy, less \$20 due it on account of unpaid premium, which she refused.

There is practically no controversy as to the facts. The main question is whether the court can say, as matter of law, on the admitted or established facts, the death of the insured resulted from voluntary exposure to unnecessary danger or obvious risk of injury, or occurred while he was violating law, and this is raised by exceptions, based on the giving of instructions for the plaintiff, refusal of instructions requested by the defendant, and the overruling of a motion to direct a verdict for the defendant and a motion to set aside the verdict.

¹² For discussion of principles, see Vance on Insurance, § 240. See, also, Cooley, Briefs on the Law of Insurance, vol. 4, p. 3216.

¹³ Part of the opinion is omitted.

The following facts are disclosed by the evidence: The insured was a car repairer in the shops of the Chesapeake & Ohio Railway Company at Huntington. In the evening of the day he was killed, after the completion of his work, he came out of the shop, walked down the railway track in a westerly direction a short distance, passing the water column, standing midway between two railway tracks, about nine feet apart, and stepped on one of two engines drawing a train of cars over a switch from the west-bound track to the east-bound track, as he had often done before. Instead of getting into the cab of the engine, he stood on a step on the outside, holding to a handgrip, while his body projected or swung from the side of it, and was riding in that way, or he was in the act of climbing into the cab, and before he had accomplished it, when the engine came to the water column and his body came into violent contact with it. * * *

While the case is one of first impression in this state, the clause in question is, and has been, in general use by insurance companies for a long time, and its construction is thoroughly settled by numerous decisions in other jurisdictions. A voluntary exposure to necessary danger is not forbidden by it. *Keene v. New England Accident Ass'n*, 161 Mass. 149, 36 N. E. 891. A merely inadvertent and unintentional exposure to a known danger, under peculiar circumstances, not affording opportunity for deliberate action, is an involuntary, not voluntary, exposure. *Keene v. Accident Ass'n* cited; *Casualty Co. v. Chambers*, 93 Va. 138, 24 S. E. 896, 40 L. R. A. 432; *Insurance Co. v. Osborn*, 90 Ala. 201, 9 South. 869, 13 L. R. A. 267. Exposure to an unknown danger, though a voluntary act, is not a voluntary exposure. *Miller v. Insurance Co.*, 92 Tenn. 167, 21 S. W. 39, 20 L. R. A. 765; *Carpenter v. Accident Co.*, 46 S. C. 541, 24 S. E. 500; *Johnson v. Accident Co.*, 115 Mich. 86, 72 N. W. 1115, 40 L. R. A. 440, 69 Am. St. Rep. 549; *Burkhard v. Insurance Co.*, 102 Pa. 262, 48 Am. Rep. 205; *De Loy v. Insurance Co.*, 171 Pa. 1, 32 Atl. 1108, 50 Am. St. Rep. 787. Either reckless or deliberate encountering of known danger, or danger so obvious that a reasonably prudent person ought to have known it at the time of encountering it, is universally held to be voluntary exposure within the meaning of this clause. *Garcelon v. Accident Ass'n*, 195 Mass. 531, 81 N. E. 201, 10 L. R. A. (N. S.) 961; *Willard v. Accident Ass'n*, 169 Mass. 288, 47 N. E. 1006, 61 Am. St. Rep. 285; *Smith v. Insurance Co.*, 185 Mass. 74, 69 N. E. 1059, 64 L. R. A. 117, 102 Am. St. Rep. 326; *Conboy v. Accident Ass'n* (Ind. App.) 43 N. E. 1017; *Insurance Co. v. Jones*, 80 Ga. 541, 7 S. E. 83, 12 Am. St. Rep. 270; *Tuttle v. Insurance Co.*, 134 Mass. 175, 45 Am. Rep. 316; *Rebman v. Insurance Co.*, 217 Pa. 518, 66 Atl. 859, 10 L. R. A. (N. S.) 957; *Alter v. Cas. & Sur. Co.*, 108 Mo. App. 169, 83 S. W. 276; *Follis v. Accident Ass'n*, 94 Iowa, 435, 62 N. W. 807, 28 L. R. A. 78, 58 Am. St. Rep. 408; *Cornish v. Insurance Co.*, 23 L. R. Q. B. D. 453.

These decisions emphasize the duty of exercising some degree of care and prudence, in view of obvious danger, even though the insured did not at the moment of injury realize it, or was not actually conscious of it, as well as that of avoiding known danger by the exercise of prudence and care, and deny to the beneficiary of the policy the right to take the opinion of the jury as to whether the insured was actually conscious of it, at the moment of the injury or of the action from which it resulted. They proceed upon that principle of the law which estops a man from saying he did not see or hear that which he must have seen or heard, if he had given his action and the surrounding circumstances that degree of attention which prudence and a due regard for his own safety and the rights of others require. This court has frequently applied it in negligence cases. *Slaughter v. Huntington*, 64 W. Va. 237, 61 S. E. 155, 16 L. R. A. (N. S.) 459; *Riedel v. Traction Co.*, 63 W. Va. 522, 61 S. E. 821, 16 L. R. A. (N. S.) 1123; *Van Pelt v. Clarksburg*, 42 W. Va. 218, 24 S. E. 878; *Hesser v. Grafton*, 33 W. Va. 548, 11 S. E. 211; *Moore v. Huntington*, 31 W. Va. 849, 8 S. E. 512; *Phillips v. County Court*, 31 W. Va. 480, 7 S. E. 427.

While the rights of the parties here are governed by the contract, and not by the legal rules and principles of the law of negligence, there are certain general principles common to many branches of the law, and operative in the determination of the rights of parties, whether they arise *ex contractu* or *ex delicto*. Though, perchance, the insured may recover on a policy of this kind, when the circumstances would deny relief under the law of negligence, since this clause does not contemplate such exposure as is incident to the ordinary habits and customs of life (*Accident Ind. Co. v. Dorgan*, 58 Fed. 945, 7 C. C. A. 581, 22 L. R. A. 620), it is nevertheless well settled that he must exercise at least ordinary care, and failure to do so is negligence in a case, determined by the law of negligence.

Many of the decisions assert that knowledge of the danger and consciousness of peril on the part of the insured are requisites to the application of this clause, but they were rendered in cases in which he was in fact ignorant thereof, and the danger was not so obvious as to invoke the rule of duty to know that which was not actually known, and it was neither mentioned nor discussed. It is believed that, in all those cases in which the danger was obvious, and there was opportunity for deliberation, not instances of sudden peril, precluding volition or producing momentary confusion of thought, the courts have uniformly held the insured bound to know it and treated him as if his knowledge thereof had been admitted or uncontroverted. There are cases, however, which have been excluded from the operation of the clause, apparently upon another principle, recognized in the law of negligence, which excuses conduct that would amount to negligence but for the suddenness with which the party was confronted with danger, rendering it uncertain as to whether the act

was voluntary or deliberate. They go to the jury for the determination of the disputed question of fact, namely, whether the act was voluntary.

We think *Fid. & Cas. Co. v. Chambers*, 93 Va. 138, 24 S. E. 896, 40 L. R. A. 432, relied upon in the brief for defendant in error as being directly in point and controlling, belongs to this class. It is akin to our negligence case of *Mannon v. Railway Co.*, 56 W. Va. 554, 49 S. E. 450. There was neither immediate nor apparent danger when the insured sat down upon the railroad, but suddenly a train came around a curve at full speed, and, in his confusion, he attempted to secure the bag he had laid on or near the track, and so subjected himself to the injury. It was a sudden emergency, and the immediate or proximate cause of injury was probably an involuntary act. Another case, so invoked, is governed by the same general principle, but differs from the *Chambers Case* in the circumstances and cause of involuntary action. The insured ran toward a moving train, without any intention of boarding it or coming into contact with it. By a mere mistake of judgment, he ran closer than he should have done. In attempting to stop he stumbled and fell against the engine. His falling was an accident and purely an involuntary act.

Applying these principles to the undisputed facts disclosed by the evidence, we conclude that, as matter of law, there was a voluntary exposure to obvious risk on the part of the insured. He must have known the location of the standpipe or water column and its proximity to the railway track. He had passed it frequently, and did so just before the accident. The danger in his attempt to climb on an engine, approaching this structure at the rate of 8 or 10 miles an hour, and at a distance of only 60 or 75 feet from it, was so baldly apparent that he, if living, could not be excused on the ground that he did not see it or was not conscious of it. Nothing in his situation or the circumstances precluded deliberate action, and he was therefore bound to avail himself of the reasonable use of his faculties and such judgment as an ordinarily prudent man would have exercised. The fact that others did the same thing or similar acts, or that he had previously done it without injury, does not alter the case. *Garcelon v. Accident Ass'n*, 195 Mass. 531, 81 N. E. 201, 10 L. R. A. (N. S.) 961; *Insurance Co. v. Seaver*, 19 Wall. 531, 22 L. Ed. 155. The beneficiary of the policy occupies no higher position in law than he would hold if living.

We are unable to accept the view that the other clause in the policy here quoted, limiting the liability when accidental injury results from or is received while quarreling, fighting, or violating the law precludes a recovery of the full amount of the policy. The mere jumping on or off of a car or train is not made a misdemeanor by chapter 145, § 31a (sec. 4232) Code 1906. A passenger or employé may lawfully do this. The statute is aimed at tres-

passers. It is penal and ought to be strictly construed. Passengers and employés are expressly excepted, because they are on the premises by invitation of the railroad company, and have right and frequent occasion to board trains. The insured in this case was an employé of the railroad company whose engine he attempted to board, and his act was therefore expressly excepted by the statute, provided he was such an employé as is within the exception. The statute does not classify either employés or trains. The terms of the exception are general. In any attempt to limit it to employés of any class or department, or to exclude sectionmen, shop employés, or others whose duties do not require them to go on board the trains or engines, or passengers boarding other than passenger trains, the courts would apply the rule of liberal construction to a penal statute in violation of a universally recognized principle. *Reeves v. Ross*, 62 W. Va. 7, 57 S. E. 284; *Hall v. N. & W. R. Co.*, 44 W. Va. 36, 28 S. E. 754, 41 L. R. A. 669, 67 Am. St. Rep. 757; *Shumate v. Com.*, 15 Grat. (Va.) 653; *Yancey v. Hopkins*, 1 Munf. (Va.) 419; *Lewis*, Suth. Stat. Con. § 526 et seq. * * * Reversed.

VI. Occupation and Employment ¹⁴

UNION MUT. ACC. ASS'N v. FROHARD.

(Supreme Court of Illinois, 1890. 134 Ill. 228, 25 N. E. 642, 10 L. R. A. 383, 23 Am. St. Rep. 664.)

BAKER, J.¹⁵ On the 1st day of September, 1885, one John Frohard was accepted as a member of the Union Mutual Accident Association, and a certificate of insurance was issued to him. On January 26, 1887, while hunting with a gun, he accidentally shot and killed himself. The appellee, Minna Frohard, who is his widow, and the beneficiary named in the certificate, filed this bill in equity against the corporation, for the purpose of compelling it to levy an assessment of \$2 for each member of the association liable at the date of the accident, for the purpose of paying the amount of \$5,000, specified in the certificate, or such part thereof as might be collected on the assessment. * * *

Section 2 of article 10 of the by-laws of appellant is as follows: "Sec. 2. Any member, who shall change his occupation to any other

¹⁴ For discussion of principles, see *Vance on Insurance*, § 242. See, also, *Cooley, Briefs on the Law of Insurance*, vol. 8, p. 2205.

¹⁵ Part of the opinion is omitted.

more hazardous than the one in which he was classified when insured, shall immediately notify the secretary of such change; and any member, receiving an injury while engaged temporarily, or otherwise, in another occupation more hazardous than the one in which he was engaged when insured, he, or his beneficiary, shall be entitled to receive only such indemnity as provided for in the class or occupation in which he is engaged at the time of the injury; and such shall be payment in full upon the part of the company."

Article 14 of the by-laws classified certificates of insurance against accidents, and placed them in six divisions, designated, respectively, as "A," "B," "C," "D," "E," and "F." This classification purported to be and was solely upon the basis of occupations, the least hazardous occupations being placed in division A, the extrahazardous occupations in division F, and other occupations in one or another of the intermediate divisions. It was provided in said article that, in the event of the death by accident of a member in division A, a sum not exceeding \$5,000 should be paid, and that in the event of such death of a member of division E, which was designated therein as "hazardous," a sum not exceeding \$1,000 should be paid. Merchants were placed in division A, and hunters in division E. * * *

The certificate or policy of insurance which was issued to John Frohard provided, among other things, as follows: "That John Frohard, by occupation, profession, or employment, a merchant, residing at Sparta, state of Illinois, is accepted as a member in division A of said association, subject to all the requirements, and entitled to all the benefits, thereof, as provided in the by-laws, and that said member, in case of death occurring through external, violent, and accidental injuries, is entitled to participate in the mortuary or relief fund of the association, not to exceed the amount of \$5,000, which sum, or such a part thereof as may be collected for that purpose by the payment of one regular assessment of two dollars (\$2) for each member of the association, liable at the date of the accident, shall within sixty (60) days after sufficient proofs have been received, be paid to his wife, Minna, if surviving. * * * It is expressly stipulated and agreed that in the event of the member being either fatally injured, or otherwise disabled, while engaged temporarily, or otherwise, in any act or occupation classed as more hazardous than the one in which he is accepted, according to the classification given by the rates and by-laws of this association, (or if not specially mentioned, approximating thereto,) then an amount shall be paid equal to the rate of the occupation in which the member is engaged when receiving the injury, and such amount shall be payment in full upon the part of the association. * * * It is expressly stipulated and agreed that this certificate is issued and accepted, subject to all the provisions, conditions, limitations, and exceptions herein contained, or referred to."

The principal contention of appellant is that the deceased was killed

while engaged temporarily in an act or occupation classed as more hazardous than the one in which he was accepted, and that appellee is therefore entitled to recover only the amount provided for such hazardous risk and occupation. The contention of appellee is that there was no change of occupation, within the meaning of the by-laws and certificate of insurance. The deceased was a hardware merchant. He did not follow the occupation of a hunter for hire or profit. He was killed while engaged in the act of hunting as a recreation, and it does not appear that he had hunted with a gun on any occasion since the issuance of the policy other than that upon which the accident occurred.

In our examination of the provisions of the by-laws and contract of insurance, we will first ascertain the proper construction to be placed upon the former. The language of section 2, as we have heretofore seen, is: Any member receiving an injury while engaged temporarily, or otherwise, in an occupation more hazardous than the one in which he was engaged when insured," etc. "Occupation" is defined by lexicographers to mean "that which occupies or engages the time or attention; the principal business of one's life; vocation; employment; calling; trade." The classification of hazards in article 14 of the by-laws is made upon the basis of occupations. Merchants, and those following other like vocations, are placed in division A; grain measurers and others in division B; paper-hangers and others in division C; teamsters and others in division D; and boatmen and others in division E. The by-laws in question must receive a reasonable construction. It would be unreasonable and absurd to hold that the merchant, who at one time measured a few bushels of grain, at another hung a few rolls of wall paper upon his own premises, at another drove a team of horses in a carriage or wagon, and at still another rowed a skiff for exercise or recreation, became, within the true intent and meaning of these by-laws, at these several times, a grain measurer, a paper hanger, a teamster, and a boatman, respectively.

The word "occupation," as found in these by-laws, must be held to have reference to the vocation, profession, trade, or calling, which the assured is engaged in for hire, or for profit, and not as precluding him from the performance of acts and duties which are simply incidents connected with the daily life of men in any or all occupations; or from engaging in mere acts of exercise, diversion, or recreation. This view is not subversive of the word "temporarily" found in said section 2, for there would be full opportunity for giving force and effect to it, in the event that a professional man, merchant, or person in some other calling, should temporarily abandon such vocation, and for purposes of profit, or as a means of gaining a subsistence, temporarily employ himself in some more hazardous occupation.

This construction of these by-laws seems to be sustained by the

authorities. In *Insurance Co. v. Burroughs*, 69 Pa. 43, 8 Am. Rep. 212, there were conditions in respect to the matter of a change of occupation, and the deceased was insured as an earthenware manufacturer, and he received a fatal injury from an accident which happened while he was assisting in hauling hay on a farm, while he was on a visit to his grandfather; and it was held there was no change of occupation or business, within the meaning of the policy there involved. In *Stone's Adm'rs v. Casualty Co.*, 34 N. J. Law, 375, the language of the condition was: "Policyholders, insured under the preferred class, will not be entitled to recover for injuries received in any employment, or by any exposure, either more hazardous in itself, or classified by the company as more hazardous, than the occupations named in the preferred class." The deceased was insured as a teacher, but, while overlooking the construction of a building he was having erected, fell from a second story, and was killed; and it was held the language of the condition had respect to employments, and not to individual acts. See, also, *Miller v. Insurance Co.*, 39 Minn. 548, 40 N. W. 839.

It is urged, however, that the contract of insurance contains the words, "in any act or occupation," instead of the mere words, "in another occupation," found in the by-law, and that the words, "while engaged temporarily, or otherwise, in an act," cannot be ignored; but that they have a definite and clear meaning, and must be given legal force and effect. It is to be noted that the words used in the contract are words selected and used by the corporation itself, and are therefore to be interpreted most strongly against it; or that, at all events, they are to be construed according to their common and literal meaning in favor of the insured. The provision of the policy, upon which is based the claim that the demand of appellee is reduced from one under division A to one under division E, is not simply that if deceased was fatally injured "while engaged temporarily, or otherwise, in any act or occupation more hazardous than the one in which he was accepted," but contains the further requirement that the "act or occupation" that will be effective to work such reduction must be one that is "classed as more hazardous, * * * according to the classification given by the rates and by-laws of the association." These words last quoted are words of limitation, pertaining to, and qualifying, the terms, "any act," and "occupation," as used in the contract. We have already seen that the classification of hazards made in the by-laws is predicated only upon occupations. There is not in the by-laws, or in the record, any classification of hazards in respect to acts. In other words, there is no act which is classified as more or less hazardous than another, and no act which is classed as more hazardous than the occupation designated in the certificate of insurance issued to the deceased.

The case, then, does not stand otherwise than it would if the word "act" were not found in the contract. The courts below properly held that the claim of appellee was under division A, and was for \$5,000.
* * * Affirmed.

VII. Liability of the Insurer—Total Disability ¹⁶

LOBDILL v. LABORING MEN'S MUT. AID ASS'N OF CHATFIELD, MINN.

(Supreme Court of Minnesota, 1897. 69 Minn. 14, 71 N. W. 696, 38 L. R. A. 537, 65 Am. St. Rep. 542.)

Action by S. C. Lobdill against the Laboring Men's Mutual Aid Association of Chatfield, Minn. Verdict for plaintiff. From an order refusing a new trial, defendant appeals.

MITCHELL, J. The defendant, an accident insurance company, issued its policy to plaintiff, whereby it insured him as a merchant by occupation, under classification preferred, "in the sum of \$25 per week, against loss of time not exceeding twenty-six consecutive weeks, resulting from bodily injuries effected through means aforesaid [external, violent, and accidental] *wholly and continuously disabling said member from transacting any and every kind of business pertaining to the occupation above stated.*"

Plaintiff alleged that on May 21, 1895, and during the life of the policy, he was accidentally thrown from his bicycle, and violently thrown forward on his face, thereby dislocating the thumb of his right hand, breaking loose some of his teeth, and so injuring or jarring his head and neck as to affect his spine and nerves to such an extent as to produce severe nervous prostration, by reason of which injuries he was wholly and continuously disabled from transacting any and every kind of business pertaining to his occupation as a merchant for 17 weeks. The principal contest is as to the construction of that part of the policy which we have italicized, and particularly of the term "wholly disabled."

Accident insurance being of comparatively recent origin, the policies do not seem to have acquired any settled form, and the decisions construing them are comparatively few, and do not seem to have agreed on any very definite meaning to be given to the term "total disability." Such authorities as there are will be found quite fully cited in Bac. Ben. Soc. § 501, and in Nibl. Mut. Ben. Soc. § 401 et seq. See, also, 4 Harv. Law Rev. p. 180.

¹⁶ For discussion of principles, see Vance on Insurance, § 244. See, also, Cooley, Briefs on the Law of Insurance, vol. 4, pp. 3287, 3312.

The cases which have placed a construction upon the term "total disability" might seem to be divided into two classes, viz. those which construe it liberally in favor of the insured, and those which construe it strictly against him. Among those of the first class may be cited *Hooper v. Insurance Co.*, 5 Hurl. & N. 545, 556; *Young v. Insurance Co.*, 80 Me. 244, 13 Atl. 896; *Turner v. Casualty Co.*, 112 Mich. 425, 70 N. W. 898, 38 L. R. A. 529, 67 Am. St. Rep. 428; and of the second class, *Lyon v. Assurance Co.*, 46 Iowa, 631, and *Saveland v. Casualty Co.*, 67 Wis. 174, 30 N. W. 237, 58 Am. Rep. 863. Any apparent conflict in the decisions, may, however, be mostly reconciled in view of differences in the language of the policies, and of the different occupations under which the parties were insured. As is well said in *Wolcott v. Association*, 55 Hun, 98, 8 N. Y. Supp. 263: "Total disability must, of the necessity of the case, be a relative term, and must depend largely upon the occupation of the party insured."

One who labors with his hands might be so disabled by a severe injury to one hand as not to be able to labor at all at his usual occupation, whereas a merchant or a professional man might by the same injury be only disabled from transacting some kinds of business pertaining to his occupation. In policies of this character the aim of the insurer usually is to get as large premiums as possible by incurring the least possible liability; and, on the other hand, after an accident occurs, the usual aim of the insured is to recover the greatest amount of indemnity for the least possible injury. All that the courts can do is to construe the contract which the parties have made for themselves; but in doing so they should give it a reasonable construction, so as, if possible, to give effect to the purpose for which it was made.

There are a few propositions applicable to the construction of the policy under consideration, which, under the evidence, are decisive of this case. The first is that total disability does not mean absolute physical inability on part of the insured to transact any kind of business pertaining to his occupation. It is sufficient if his injuries were of such a character that common care and prudence required him to desist from the transaction of any such business so long as it was reasonably necessary to effectuate a cure. This was a duty which he owed to the insurer as well as to himself. *Young v. Insurance Co.*, *supra*. The second is that under the particular terms of this policy, to wit, "from transacting any and every kind of business pertaining to the occupation above stated" (merchant), inability to perform some kinds of business pertaining to that occupation would not constitute total disability within the meaning of the policy. For example, the occupation of a retail country merchant (as plaintiff was) embraces various departments or kinds of business, such as keeping the books, making out accounts, and settling with customers; waiting on customers, and doing up their purchases in packages; also the handling and arranging of goods in the store. If an injury disabled the insured

merchant from transacting one or more of these branches of the business, but left him able to transact others with due regard to his health, he would not be totally disabled within the meaning of this policy. But, fourth, the mere fact that he might be able, with due regard to his health, to occasionally perform some single and trivial act connected with some kind of business pertaining to his occupation as a merchant would not render his disability partial instead of total, provided he was unable substantially or to some material extent to transact any kind of business pertaining to such occupation.

To illustrate this proposition by reference to the evidence in this case, it appears, as we shall assume, that on one or two occasions where the plaintiff went into his store when down town for other purposes he handed out some small article to a customer, and took the change for it. This would not necessarily prove that he was able to attend to the business of waiting on customers, and that he was not "wholly disabled" within the meaning of the policy. He might be able, on temporary visits to the store, to occasionally perform a trifling act of this nature, and yet be substantially and essentially unable to transact any kind of business pertaining to his occupation of merchant. The frequency and nature of these acts would be for the consideration of the jury in determining whether he was totally disabled; but would ordinarily be by no means conclusive on that question.

It only remains to apply these principles or rules to the evidence. The evidence was, as might be expected, conflicting; but that introduced on part of the plaintiff reasonably tended to show that the dislocation of his thumb was by no means the most serious of his injuries; that by his fall he so injured his head and neck as to produce severe nervous prostration, which so seriously affected his general health and strength as to render him unable to transact, to any material or substantial extent, any part of his business as merchant; that due regard to his health required him to wholly desist from attempting to do so, and that he was so advised by his physician; that when at home he went down town several times a week to receive medical treatment from his physician, and to get shaved; that when he did so he would frequently go into his store, and sit down for a brief time, but when there took no part or interest in the transaction of the business except the trivial acts on two or three occasions, already referred to; that upon the advice of his physician he went to Chicago, to consult a medical specialist; that when he returned, his health not appearing to be improved, his family took him off on two occasions on a summer outing; and that it was not until the last of September or the first of October that he was sufficiently recovered to give any considerable attention to any part of his business. This evidence, in our judgment, justified the jury in finding that he was, for the full 17 weeks, wholly disabled, within the meaning of the policy, from transacting any and every kind of business pertaining to his occupation as a merchant.

The requests to charge referred to in the assignments of error were properly refused, for the reason, if no other, that they all assumed that if the plaintiff on some particular date performed some single act connected with his business,—as, for example, handing a customer a package of garden seeds, or a dozen of nails,—it necessarily followed that he was not “wholly disabled” at that date within the meaning of the policy.

In his application for this insurance the plaintiff stated the value of his time to be \$25 a week. It cropped out on the trial that he held like insurance for like amounts in three other companies. As no point was made on the trial but that he was entitled to recover, if at all, \$25 a week during his total disability on the policy in suit, the question of the effect of the other insurance on the amount he is entitled to recover is not before us. Order affirmed.

GUARANTY, CREDIT, AND LIABILITY INSURANCE

I. Fidelity and Guaranty Insurance ¹

CHAMPION ICE MFG. & COLD STORAGE CO. v. AMERICAN BONDING & TRUST CO.

(Court of Appeals of Kentucky, 1903. 115 Ky. 863, 75 S. W. 197, 103 Am. St. Rep. 356.)

Action by the Champion Ice Manufacturing & Cold Storage Company against the American Bonding & Trust Company. From a judgment for defendant, plaintiff appeals.

SETTLE, J.² The appellant, Champion Ice Manufacturing & Cold Storage Company, is a corporation doing business in Covington, Ky. It had in its employ a bookkeeper, Geo. H. Weitkamp by name, of whom it required a bond of indemnity, which was furnished by the appellee, American Bonding & Trust Company, for the consideration of \$12.50 paid it in cash. By the terms of this bond, appellee agreed to indemnify appellant for one year for any "loss which it might sustain by reason of any fraudulent or dishonest act upon the part of Weitkamp, amounting to larceny or embezzlement," that might occur while he continued in appellant's service as bookkeeper. It appears that Weitkamp, while in appellant's service, wrongfully converted \$94.91 of its money, and, in addition, raised five of its checks, each \$100 in amount, which he caused to be cashed at the First National Bank of Covington, and appropriated to his own use the amounts thus fraudulently realized.

These frauds seem to have been committed in the following manner: The weekly pay roll of the appellant company, as prepared by one of its officers, was furnished Weitkamp, as bookkeeper, with direction to make out the checks, payable to himself, for the amounts indicated. Upon thus filling out the checks as directed, Weitkamp handed them to the proper officer of the company, who signed and returned them to him to take to the bank to be cashed. Weitkamp raised five of these checks \$100 in amount, each, had them cashed, and retained the amounts of the excess over and above the sums for which they were originally and truly issued. * * * The aggregate amount realized by Weitkamp, from the fraudulent alterations of the checks was \$500, and the additional sum of \$94.91 he retained out

¹ For discussion of principles, see Vance on Insurance, §§ 247, 248. See, also, Cooley, Briefs on the Law of Insurance, vol. 4, pp. 3319-3323, 3336-3338.

² Part of the opinion is omitted.

of moneys collected by him as bookkeeper of appellant, or took from its money drawer. * * *

The appellee filed answer to the petition, denying any liability on the bond, except to the extent of \$94.91. * * *

The appellee company is engaged in the business of furnishing bonds to secure the honesty and fidelity of fiduciaries and employés, and the one sued on in this case provides, among other things, that appellee "does hereby agree that it will within three months after receipt of proof, satisfactory to its officers and subject to the conditions hereinafter expressed, reimburse the employer [appellant], to an amount not in excess of the penalty of this bond [\$2,500], for such pecuniary loss as the employer shall have sustained of money, securities, or other personal property belonging to the employer, or for which the employer is responsible, by any act of fraud or dishonesty amounting to larceny or embezzlement committed by the employé during the continuance of this bond, in the performance of the duties of said office, or position, or such other position as he may be subsequently appointed to, or called upon to fill by the employer in said service." The bond further provided that, in case of discovery of default or loss, the appellant should give immediate notice to appellee, etc.

There can be no question but that the covenants of the bond cover such a loss as was sustained by the appellant. Its only purpose was to insure against loss that might result to appellant from the fraud or dishonesty of Weitkamp, amounting to larceny or embezzlement, whether the loss was that of money, securities, or other personal property belonging to appellant, or for which it might be made responsible; and the indemnity thus afforded by the bond not only applies to any act of fraud or dishonesty which Weitkamp may have committed in the performance of his duties as bookkeeper, but also to such as he may have committed in any other position in appellant's employment to which he may have been appointed, or called upon to fill. It is not material, therefore, whether the fraudulent and dishonest acts of Weitkamp which caused loss to appellant were committed by the making of false entries in its books, by the raising of its checks, or by abstracting money from its money drawer; nor is it material whether he was at the time acting as bookkeeper, or in some other capacity in appellant's service. In either or in any of these events, appellee, under the terms of the bond, would be, and is, liable for the loss which he occasioned.

There can be no doubt, under the evidence in this case, but that Weitkamp was authorized by appellant, and that it was a part of his duty, to receive money due it from its customers, and to draw money from the bank in which appellant's account was kept; and it was also his duty to account to appellant for the moneys thus received. His failure to do so was dishonest and fraudulent, and, in fact, constituted

an act of embezzlement; and, for the loss resulting to his employer thereby, appellee's liability is fixed by the terms of the bond.

It was not necessary, in order to fix the liability of appellee upon the bond, that appellant should produce, in support of any claim that it might have arising thereunder, such proof as would convict Weitkamp of the crime of larceny or embezzlement as defined by the laws of Kentucky. Such a narrow construction of the provisions of the contract is not required by the law, and was never contemplated by the parties to it. While larceny is a common-law crime, yet in this state it is to a great extent statutory. Embezzlement is purely a statutory crime, but the terms "larceny" and "embezzlement," in the bond or policy sued on, are used as generic terms to indicate the dishonest and fraudulent breach of any duty or obligation upon the part of an employé to pay over to his employer, or account to him for, any money, securities, or other personal property, the title to which is in the employer, that may in any manner come into the possession of the employé.

It will be observed that the bond in this case is a printed one—prepared, doubtless, by a skilled attorney in appellee's employ. The contract expressed therein is but a form of insurance, and the law of insurance is that in the construction of policies, if there be any ambiguity in them, it must be construed most strongly against the insurance company. In *American Surety Company v. Pauly*, 170 U. S. 133, 18 Sup. Ct. 552, 42 L. Ed. 977, Mr. Justice Harlan admirably states this rule as follows: "If, looking at all its provisions, the bond is fairly and reasonably susceptible of two constructions, one favorable to the bank, and the other favorable to the surety company, the former, if consistent with the objects for which the bond was given, must be adopted; and this for the reason that the instrument which the court is invited to interpret was drawn by the attorneys, officers, or agents of the surety company. This is a well-established rule in the law of insurance. *First National Bank v. Hartford Fire Insurance Company*, 95 U. S. 673 [24 L. Ed. 563]. * * * As said by Lord St. Leonards in *Anderson v. Fitzgerald*, 4 H. L. Cas. 483: 'It [a life policy] is, of course, prepared by the company; and if, therefore, there should be any ambiguity in it, it must be taken, according to law, most strongly against the person who prepared it.' There is no sound reason why this rule should not be applied in this case. The object of the bond in suit was to indemnify or insure the bank against loss arising from any act of fraud or dishonesty on the part of O'Brien in connection with his duties as cashier, or with the duties to which, in the employer's service, he might be subsequently appointed. That object should not be defeated by any narrow interpretation of its provisions, nor by adopting a construction favorable to the company, if there be another construction equally admissible under the terms of the instrument executed for the protection of the bank."

In *Fidelity & Casualty Company v. Gate City National Bank*, 97

Ga. 634, 25 S. E. 392, 33 L. R. A. 821, 54 Am. St. Rep. 440, a bond similar to the one under consideration was executed by the Fidelity & Casualty Company to indemnify the bank against loss by reason of the fraud or dishonesty of one Lewis Redwine in connection with his duties as paying teller, "or the duties to which in the employer's service he may be subsequently assigned by the employer." After the execution of the bond, Redwine was made assistant cashier, and as such became a defaulter, causing loss to the bank in a large amount. The Supreme Court of Georgia, in discussing the liability of the guaranty company on the bond, said: "One of the questions for decision is whether or not the company was surety for him in the latter capacity [that of assistant cashier]. In view of the comprehensiveness of the above-quoted language, it would be difficult to hold it was not. He was certainly appointed subsequent to the execution of the bond to the office of assistant cashier, as such had duties to perform in his employer's service, and by a violation of those duties brought loss to the master. We think the plain language of the contract covers the precise state of facts which arose, and that the company is as much bound to answer to the bank for Redwine's dishonesty in the latter capacity as in the former."

Under the rule announced in the case *supra*, it is manifest that though Weitkamp, in the application made by appellant to appellee for the bond sued on, was designated as a bookkeeper in its service, and is so entitled in the bond itself, the fact that he was intrusted by his employer with the duty of making out checks, and drawing money from the bank thereon, did not relieve appellee from liability on the bond, as, at most, the additional duty was only one that was assigned him by his employer subsequent to the execution of the bond, and was allowed by the terms of the bond itself. We are not, however, prepared to concede that the appellee would not have been liable for the dishonesty of Weitkamp in causing loss to his employer by raising the checks, and appropriating the money thereby received from the bank. Even in the absence of the provision of the bond mentioned, for we incline to the opinion that the duty of making out checks, and procuring money of the bank thereon, was a service that might properly and naturally have been intrusted to a bookkeeper.

It is contended by counsel for appellee that the First National Bank of Covington is liable to appellant for the sum embezzled by Weitkamp, and that it therefore has no cause of action upon the bond executed by appellee. We do not so understand the law. * * * But even though the bank were liable to appellant for the amount the checks were raised, that fact would not, in our opinion, exonerate appellee from liability. The purpose of the bond was to furnish indemnity to appellant from loss resulting from the fraud or dishonesty of Weitkamp. The position of appellee was not only that of an insurer, but in some sort that of a surety as well, and in both these capacities its liability is primary and direct. It would be restricting the law of

both insurance and suretyship to an absurd degree to say that appellee cannot be held liable until after appellant, having exhausted every other remedy, or prosecuted to insolvency any others who might be liable, is still not reimbursed.

In other words, appellee's liability does not depend upon whether appellant might collect the stolen \$500 from some one else. Having a right of action against the defaulter, Weitkamp, appellant has also a right of action against the guarantor of his honesty. * * * Reversed.³

II. Credit Insurance ⁴

SHAKMAN v. UNITED STATES CREDIT SYSTEM CO.

(Supreme Court of Wisconsin, 1896. 92 Wis. 366, 66 N. W. 528, 32 L. R. A. 383, 53 Am. St. Rep. 920.)

Action by L. A. Shakman against the United States Credit System Company on a written contract issued by defendant to plaintiff, and called a "certificate of guaranty." The plaintiff is a manufacturer of clothing, doing business in Milwaukee, and was such in 1889. The defendant was, at that time, a corporation, incorporated under the laws of the state of New Jersey. It appeared that, about the 23d day of October, 1889, the defendant's agent at Chicago, one Langsdorf, called on the plaintiff, and the plaintiff then made a written application to the defendant company for a certificate of guaranty.

This application, so far as necessary to be stated, is as follows: "L. A. Shakman & Co. hereby apply for a guaranty of five thousand dollars of the debts of the persons to whom we may sell goods, according to the system of said company, during the period of one year, commencing on the 1st day of July, 1889, and ending on the 1st day of July, 1890, and for that purpose we hereby make application to purchase of said company a certificate of guaranty, according to its system of credits, under the copyright of said company, for said term, and desire to enter series A of said company, which series is made up of not more than six hundred and fifty certificates, averaging a guaranty of \$5,000 for each certificate. This application is made with the understanding that the said company limits its liability to pay excess losses in any one series in accordance with the following table, less the deduction allowed, to be made by said company, as the value of the bad debts sustained by the applicant, which is hereby agreed to be

³ Compare *Reed v. Fidelity & Casualty Co.*, 189 Pa. 596, 42 Atl. 294 (1899).

⁴ For discussion of principles, see *Vance on Insurance*, § 251. See, also, *Cooley, Briefs on the Law of Insurance*, vol. 4, pp. 3323-3326, 3338-3341.

12½ per cent. of the total amount of losses incurred by reason of bad debts remaining unpaid at the time of proving applicant's losses against said company."

Langsdorf forwarded this application to the company, by whom it was accepted and a "Certificate of Guaranty" returned to Langsdorf, who delivered it to Shakman on the 8th day of November, 1889. This certificate reads as follows:

"For and in consideration of the terms and conditions herein named, and of the sum of one hundred and forty-five dollars, paid by L. A. Shakman & Co., hereby grants, bargains, and sells to the said L. A. Shakman & Co. this certificate, issued under its copyrighted system of credits, in series A, class B, for the term of one year, commencing on the 1st day of July, 1889, and ending on the 1st day of July, 1890. And for said consideration the said United States Credit System Company guaranties, covenants, and agrees that if the said L. A. Shakman & Co. should, by reason of the insolvency of any debtor or debtors, who owe such debtor debts for merchandise sold and delivered during said period, under the credit system of said company as hereinafter mentioned, or by reason of any uncollectible judgment or judgments that he or they may have obtained, for the sum or sums of money due for merchandise sold and delivered as aforesaid, have losses in excess of 1¾ per cent. on their total sales made during the above limited period, to pay such excess loss, not exceeding five thousand dollars, less the deductions, and subject to the terms and conditions hereinafter named. It is, however, expressly agreed and understood that this certificate forms a part of series A, and the company's liability to pay excess losses in any series is limited to the fund or funds provided for said series, as appears more specifically in the application signed by said L. A. Shakman & Co., which application forms a part of this certificate.

"Terms and Conditions.

"(1) That no credit which may have been given to any party or parties shall be included in the calculation of losses, unless he or they were rated in R. G. Dun & Co.'s Mercantile Agency in the latest books or reports issued by it at the time of shipping the goods, and that no special or other report was received by said L. A. Shakman & Co. changing the same. And in case any change has occurred, such sale and shipment shall be considered to have been made in accordance with such change. (2) That, in calculating the losses, no credit that may have been given shall be included therein exceeding credit of 30 per cent. on the lowest capital rating such party or parties were rated in said Mercantile Agency's books or reports. (3) That, in the calculation of losses, no account against any debtor shall be included therein for more than ten thousand dollars. (4) That no credit that may have been given shall be included in the calculation of losses, unless the rating of the party to whom such credit is given was at least two

thousand dollars (\$2,000) at the time of shipping the goods, and that the credit rating was the best or next to the best for the capital.

* * *

"Special: In condition No. 2, 20 per cent. is changed to 30 per cent. Condition No. 4 is changed so as to include sales to parties whose rating is K 3½ in Dun's Agency Book."

At the time of the delivery of this certificate, and before payment of the consideration or premium, Shakman objected that the policy did not allow the use of Bradstreet's reports of ratings as well as Dun's. There is a conflict in the evidence as to what followed this objection. Shakman's evidence tends to prove that Langsdorf said he would concede this, and that he had authority to do so, and that Langsdorf thereupon wrote, and delivered with the policy, the following slip: "Milwaukee, Nov. 8, 1889. Indorsement to certificate No. 3,452, in favor of L. A. Shakman & Co., to wit: Should any party to whom above-named firm may sell goods not be rated within the system of this company at Dun's Mercantile Agency, and Bradstreet's Agency does rate such party, within the system of this company, then, in such cases, the latter shall be binding upon this company. A. Langsdorf, Genl. Supt." Langsdorf, on the other hand, while admitting that Shakman objected to the policy because it did not allow the use of Bradstreet's ratings as well as Dun's, denies that he gave the indorsement to Shakman as a contract, but says that he told him he would submit the matter to the company for their decision, and that he wrote out the indorsement simply to show Shakman how it would read in case the company approved it. At the same time, and after the delivery of the slip, Shakman paid to Langsdorf the premium of \$155.

It appeared that one Fishell was the partner of Langsdorf, and that their office was at Chicago, and that they styled it the "Western Department" of the United States Credit Company; Langsdorf calling himself general superintendent, and Fishell general manager. Langsdorf testifies that they assumed these titles without authority of the company, and really only had authority to solicit business and collect premiums. On or about November 26, 1889, the plaintiff received a letter from Fishell as follows: "Inclosed find indorsement slip, as requested, which please attach to the certificate, to take the place of the agreement left with you signed by our Mr. Langsdorf. Very respectfully, Albert Fishell, Mgr." The slip inclosed reads as follows: "Should Dun's Mercantile Agency not rate a party, and Bradstreet's Agency should give such party a rating or report, and such rating or report is sufficient to be covered by the system of this company, then and in that case the said L. A. Shakman & Co. may use Bradstreet's Mercantile Agency as a basis for such party. This special permission to take effect November 13, 1889. [Signed] Fred M. Wheeler, Secretary." The plaintiff read the letter, but not the slip, and paid no attention to it, and did not return it.

Judgment for the plaintiff for \$2,856.75, with interest and costs, was rendered, and the defendant appealed.

WINSLOW, J.⁵ We regard the contract before us as unquestionably a contract of insurance. An insurance contract is a contract whereby one party agrees to wholly or partially indemnify another for loss or damage which he may suffer from a specified peril. The peril of loss by the insolvency of customers is just as definite and real a peril to a merchant or manufacturer as the peril of loss by accident, fire, lightning, or tornado, and is, in fact, much more frequent. No reason is perceived why a contract of indemnification against this ever present peril is not just as legitimately a contract of insurance as a contract which indemnifies against the more familiar, but less frequent, peril by fire. This very contract has been (sub silentio) construed as a policy of insurance by the supreme court of New Jersey. *Robertson v. Credit System Co.*, 57 N. J. Law, 12, 29 Atl. 421.

The contract being, then, a contract of insurance, and the defendant's business being the making of such contracts, it follows that the defendant is an insurance corporation, within the meaning of sections 1977 and 1978, Rev. St. Langsdorf was its agent for the purpose of soliciting insurance, transmitting applications, and collecting premiums, and received pay therefor. He was, consequently, under section 1977, supra, its agent for all intents and purposes, and had power to make the additional agreement contained in the indorsement dated November 8th. *Renier v. Insurance Co.*, 74 Wis. 89, 42 N. W. 208. The court has found, on ample evidence, that he did make that agreement, and the fact is therefore settled. It is, then, a fact in the case that a complete contract of insurance was made, on or about November 8th, by the terms of which the plaintiff was to have the right to use the Bradstreet's ratings in case a given customer was given no rating by Dun.

But it is said that the memorandum sent to the plaintiff November 26th, which permitted the use of Bradstreet's reports only after November 13th, 1889, became effective and binding by reason of the plaintiff's receiving it and failing to object thereto. We are unable to agree with this contention. The agreement of November 8th, being perfect, the letter and inclosed memorandum of November 26th could, at the most, amount to nothing more than a proposal to change the terms of the existing contract. This the plaintiff could do or not, as he chose; but it cannot be said that he did so unless he expressly agreed to the change, or unless his silence was legally equivalent to an express consent to the proposed change. There was no express agreement to make the change, nor do we think that the simple failure to answer the proposal should be construed as such an agreement, in the absence of all evidence showing that the defendant was influenced in

⁵ The statement of facts is abridged from the original report and part of the opinion is omitted.

its conduct by plaintiff's silence. An agreement inferred from silence must, in such case, rest on the principle of estoppel; and one essential element of estoppel is lacking here, namely, a change of position on the part of the defendant, relying on the plaintiff's silence, which would result in substantial injury to the defendant were it not permitted to rely on the estoppel. The conclusion necessarily is that the contract which became perfected November 8th, with the Langsdorf indorsement, became the contract governing the rights of the parties.

Another question now arises upon the construction to be given to the Langsdorf indorsement. It will be noticed that the policy, though dated October 23, 1889, in terms covers the period of one year commencing on the 1st of July, 1889, and that it insures against losses accruing for merchandise sold and delivered during that period. Thus, the contract covers several months' business transactions previous to its date. It appears in evidence that a considerable number of the losses for which the plaintiff has recovered judgment were suffered between July 1, 1889, and the delivery of the contract, and that these losses arose from credits given to parties who had no credit rating in Dun's reports, but did have such rating in Bradstreet's reports. It is now contended that the Langsdorf indorsement is purely prospective in its operation, and only insures losses occurring after November 8th; so that, for the losses occurring before that date, covered by Bradstreet's reports only, there can be no recovery. The indorsement reads: "Should any party to whom above-named firm may sell goods not be rated, within the system of this company, at Dun's Mercantile Agency," etc. The argument cannot prevail. This indorsement is part of the whole contract. It must be read in connection with all the other provisions of the contract, and as though it were incorporated in the contract at the proper place. So read, there can be no doubt that the contract refers to all goods sold and credits given between July, 1889, and July, 1890, and that the right to use the Bradstreet ratings in the proper cases was intended to be as broad in its terms as to time as the right to use the Dun ratings.

Subdivision 2 of the terms and conditions of the policy provides that, in calculating "losses, no credit that may have been given shall be included therein, exceeding a credit of 30 per cent. on the lowest capital rating such party or parties were rated at in said mercantile agency's books or reports." In a number of instances of losses the plaintiff had given the insolvent debtors a larger credit than 30 per cent. of their lowest capital rating. The court allowed, in such cases, 30 per cent. of such rating, and disallowed the excess. It is claimed by appellant that the clause means that the entire credit is to be excluded, and not simply the excess above 30 per cent. of the rating. This is purely a matter of construction of language, and our construction agrees with that of the trial court, namely, that it is only that part of the credit exceeding 30 per cent. of the rating which is to be excluded.

It is claimed that a loss of \$300 suffered by the failure of one Simansky was improperly allowed. It appears that Simansky's name appears in Dun's reports with the notation "Blank 3"; that is, no capital rating, and credit "fair." In Bradstreet's reports, however, he appears rated "X D," which means \$1,000 to \$2,000 capital, credit fair. It seems to us that this loss was properly allowed. Simansky had no capital rating in Dun's reports. The system of the defendant required both a capital and a credit rating. This was, therefore, a case clearly within the Langsdorf indorsement, where the party was not "rated within the system of the company" at Dun's Agency, and was so rated in Bradstreet's Agency. * * * Affirmed.

III. Employer's Liability Insurance *

STEPHENS v. PENNSYLVANIA CASUALTY CO.

(Supreme Court of Michigan, 1903. 135 Mich. 189, 97 N. W. 686, 3 Ann. Cas. 478.)

Action by Henry Stephens against the Pennsylvania Casualty Company. From a judgment for plaintiff, defendant appeals.

This is a case-made after judgment. On April 14, 1900, the defendant and the Detroit, Rochester, Romeo & Lake Orion Railway Company entered into a contract of indemnity; the only parts which bear upon this controversy being as follows:

"In consideration of the Agreements hereinafter and the Warranties in the application for this Policy contained, which application is made a part of this Contract of Insurance, and of fourteen hundred dollars premium, The Pennsylvania Casualty Company of Scranton, Pennsylvania (hereinafter called 'the Company') does hereby agree to indemnify Detroit, Rochester, Romeo & Lake Orion Railway Company of Detroit, County of Wayne and State of Michigan (hereinafter called 'the Assured') for the term of one year, beginning on the fourteenth day of April, 1900, at noon, and ending on the fourteenth day of April, 1901, at noon, standard time, against Legal Liability of the Assured for injury to or death of persons, and all legal liability arising or accruing therefrom for loss of service, funeral expenses, and medical attendance, being the result of casualties occurring by reason of the operation of the Street Railway named in the said application to an amount not to exceed twenty-five hundred dollars for injury to or death to any person, and subject to the same limit for each person not to exceed ten thousand dollars for the total liability in any one

* For discussion of principles, see Vance on Insurance, §§ 252, 253. See, also, Cooley, Briefs on the Law of Insurance, vol. 4, pp. 3313-3319, 3330-3335.

casualty, whereby several may be killed or injured; and not to exceed thirty thousand dollars for total liability during the term of this contract.

“Special Agreements.

* * * * *

“(7) The indemnity hereby provided for shall not be payable until the loss or damage has been adjusted and settled by the Company nor until thirty days after satisfactory particulars of the loss or damage shall have been furnished the Company.

* * * * *

“(10) The Company shall have control of the defense of any legal proceedings against the Assured in the name and on behalf of the Assured for accidents covered by the provisions of this contract, and in case legal proceedings shall be instituted against the Assured for such accidents, the Assured shall, within five days of the service of any writ upon the Assured, deliver to the Company, at its home office, any writ, and all papers or copies of the same, pertaining to said suit or action, and all other papers received, possessed or controlled by the Assured, relating to such suit or action, immediately upon receipt of same, and keep the Company at all times informed of each successive step, and of all steps taken in said suit or action, immediately upon the occurrence of the same, and render to the Company all necessary information and assistance to properly conduct a defense, or prosecute an appeal, or effect a settlement, and a failure of the Assured to fully comply with the provisions of this section shall release the Company from all liability by reason of such accident, suit or action.”

On September 21, 1900, a passenger upon the railroad was injured, brought suit, and recovered on May 2, 1901, a judgment of \$2,592 and costs of suit, taxed at \$88.71. The defendant assumed the direct control of the defense in that suit. The railroad company was satisfied with the adjustment, and did not desire to appeal, but the casualty company insisted upon appealing to the Supreme Court. It was finally agreed to assign only such errors as would, if sustained by the Supreme Court, result in a reversal of the judgment without ordering a new trial. Upon an appeal to this court, taken at the instigation of the defendant, which paid all the expense of the appeal, the judgment was affirmed February 11, 1902 (89 N. W. 52), and costs taxed on February 20th at \$73.51. On March 17, 1902, the judgment and the costs of both courts, and the accrued interest upon the judgment and costs, totaling \$2,892, were paid by the railway company; plaintiff furnishing the money, and taking an assignment of the claim against the defendant.

GRANT, J. [†] The main question arises upon the construction of the contract of indemnity. Plaintiff contends that the legal liability became adjusted and settled upon the rendition of the judgment in the

[†] The statement of facts is abridged and part of the opinion is omitted.

circuit court. Defendant insists that the liability was not adjusted and settled until the judgment was paid, or, if that be not so, until the final determination in the Supreme Court. The contention of the defendant upon the trial was that its liability was limited to \$2,500, and that, having paid that amount into court, its liability ended. This result would follow if its construction of the contract be sound.

We think that, under the terms of this contract, when a final judgment was rendered against the railroad company the liability under defendant's contract became fixed, and it was obligated to pay the amount of the indemnity, although the judgment had not been paid. Under defendant's claim, if the indemnitee were insolvent and never paid the judgment, the indemnitor would never be compelled to pay. This result would, of course, follow if the contract of indemnity required the indemnitee to be first damnified by payment, as was held in the case of *Weller v. Eames*, 15 Minn. 461 (Gil. 376), 2 Am. Rep. 150, upon which the defendant largely relies. That case is distinguishable from the present and others like it. *Weller*, the plaintiff, was one of the two defendants who were sued for the same cause of action. *Weller* alone obtained an indemnity bond. It might very well be held that in such case *Weller* might never be compelled to pay, as plaintiff might enforce his judgment against the other defendant. However that may be, the weight of authority seems to be that contracts like that in this case are held to constitute an indemnity against liability for damages, and not merely indemnity against damages. In the former case payment is not essential, while in the latter it is.

The authorities make a distinction between these two classes of indemnity. This distinction is very clearly stated in *Gilbert v. Wiman*, 1 N. Y. 550, 49 Am. Dec. 359, wherein the court say: "By the former [a contract to indemnify against liability] he [the indemnitee] is to be saved from the thing specified; by the latter [a contract to indemnify against loss or damage], from its consequences. * * * It is the distinction between an affirmative covenant for a specific thing, and one of indemnity against damage by reason of the nonperformance of the thing specified. The object of both may be to save the covenantee from damages, but their legal consequences to the parties are essentially different." See, also, 16 Am. & Eng. Enc. Law (2d Ed.) 178.

The following authorities hold that, under contracts of like character with the one in this case, a payment of the judgment is not essential to recovery. *Pickett v. Casualty Co.*, 60 S. C. 477, 38 S. E. 160, 629; *Fenton v. Casualty Co.*, 36 Or. 283, 56 Pac. 1096, 48 L. R. A. 770; *Anoka, etc., v. Casualty Co.*, 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689; *Hoven v. Association, etc.*, 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388; *McBeth v. McIntyre*, 57 Cal. 49.

Which judgment fixed the time of liability—the judgment in the circuit court, or the one in the Supreme Court? By the terms of the contract, the defendant's liability was limited to \$2,500. It had the

right to compromise and settle with the injured party, or, if it concluded that the railroad company was not liable for negligence, it had the right to contest the suit. It was also contemplated by the contract that defendant might appeal the case to the Supreme Court. This right of appeal in the defendant was absolute. If the railroad company had settled the case, after such appeal had been taken without the defendant's consent, or against its protest, the defendant would have been discharged from liability. *American Surety Co. v. Ballmar*, (C. C.) 104 Fed. 634; *Security Trust Co. v. Robb* (C. C.) 116 Fed. 201. This right, therefore, was given by the contract, and the loss or damage was not adjusted and settled until the determination of the case in this court. By that adjudication the defendant's liability was adjusted and settled. Interest, therefore, can be charged only from February 11, 1902. * * * Modified.

IV. Rights of Injured Person in Insurance Fund *

BAIN v. ATKINS.

(Supreme Judicial Court of Massachusetts, 1902. 181 Mass. 240, 63 N. E. 414, 57 L. R. A. 791, 92 Am. St. Rep. 411.)

Suit by Bain against Atkins and another. Reserved case.

BARKER, J. It is now settled by the findings and the agreed facts that when the plaintiff began this attempt to reach, in liquidation of his claim against Atkins, a supposed obligation to Atkins on the part of the Union Casualty & Surety Company, that obligation was no longer in existence. The bill was filed on January 19, 1898. Nine days before that date the supposed obligation, disputed by the company, had been ended by an actual payment of money then made by the company to Atkins on a settlement made in good faith on the part of both, and without notice to either of any claim on the part of the plaintiff in the obligation, or founded upon it. The settlement was not made for the purpose of enabling Atkins to avoid his liability to the plaintiff, nor of enabling the company to avoid any liability to the plaintiff. When it was made the company had no knowledge of Atkins' financial condition.

The settlement is found to have been made as in the ordinary course between two parties, one of whom denied all liability, and wanted to settle for as little as it could without injuring its reputation for fair dealing with those who insured with it, and the other of whom wanted

* For discussion of principles, see Vance on Insurance, § 254. See, also, Cooley, Briefs on the Law of Insurance, vol. 4, p. 3335.

to get all he could, up to the full amount of his claim. Atkins put into his business the \$3,000 which he received in the settlement, and, had it not been for the judgment of \$7,000 afterwards recovered against him by the plaintiff in the action of tort for personal injuries then pending, Atkins could have gone on with his business. He went into bankruptcy in consequence of that judgment, and has paid nothing upon the judgment, and the plaintiff has been unable to collect the judgment, in whole or in part.

We do not consider whether, if, when the bill was brought, the company had been under an existing obligation to indemnify Atkins against the plaintiff's demand, the latter could have compelled, in equity, the application of that obligation to the satisfaction of his claim against Atkins. The fact that when the plaintiff sought the aid of an equity court there was no such obligation is conclusive against the contention that there was an equity springing from such an obligation.

Therefore the plaintiff is compelled to contend that the obligation of the company upon the happening of the accident constituted a fund for the benefit of the plaintiff, impressed with a trust for him; that such a trust fund could be paid to Atkins, if at all, only to reimburse him after he had satisfied his own liability to the plaintiff; and that the company's settlement with Atkins without the consent of the plaintiff was in the company's own wrong, and void as to the plaintiff.

The essence of this contention, without which no part of it can stand, is that the insurance constituted a trust fund for the benefit of the plaintiff, and for this there is no ground.

The only parties to the contract of insurance were Atkins and the company. The consideration for the company's promise came from Atkins alone, and the promise was only to him and his legal representatives. Not only was the plaintiff not a party to either the consideration or the contract, but the terms of the contract do not purport to promise an indemnity for the benefit of any person other than Atkins. The policy only purports to insure Atkins and his legal representatives against legal liability for damages respecting injuries from accidents to any person or persons at certain places, and within the time and under the circumstances defined. It contains no agreement that the insurance shall inure to the benefit of the person accidentally injured, and no language from which such an understanding or intention can be implied. Atkins was under no obligation to procure insurance for the benefit of the plaintiff, nor did any relation exist between the plaintiff and Atkins which could give the latter the right to procure insurance for the benefit of the plaintiff. The only correct statement of the situation is simply that the insurance was a matter wholly between the company and Atkins, in which the plaintiff had no legal or equitable interest, any more than in other property belonging absolutely to Atkins.

Most of the cases cited in support of the plaintiff's contention are entirely wide of the mark. In all of them the obligation which the plaintiff sought to apply to the extinguishment of his demand existed when he brought his suit. In *Anoka Lumber Co. v. Fidelity & Casualty Co.*, 63 Minn. 286, 65 N. W. 353, 30 L. R. A. 689, *Hoven v. Assurance Corp.*, 93 Wis. 201, 67 N. W. 46, 32 L. R. A. 388, and *Fritchie v. Extract Co.*, 197 Pa. 401, 47 Atl. 351, the liability of the insurer was sought to be reached by process of garnishment. In *Insurance Co. v. Fordyce*, 62 Ark. 562, 36 S. W. 1051, 54 Am. St. Rep. 305, and *Casualty Co. v. Fordyce*, 64 Ark. 174, 41 S. W. 420, the question was whether the insured must first pay the judgment in favor of the employé, before an action could be brought upon the policy. In *Fenton v. Casualty Co.*, 36 Or. 283, 56 Pac. 1096, 48 L. R. A. 770, the action against the insurer by a surgeon who had attended an injured employé was allowed because of an assignment to the plaintiff of the cause of action. In *Embler v. Insurance Co.*, 158 N. Y. 431, 53 N. E. 212, 44 L. R. A. 512, the decision was that a suit could not be maintained by an assignee of the administratrix of an employé who had been killed by an explosion, against the insurer, upon a policy issued to the employer. The decision was put by the majority of the court upon the ground that there was no such relation between the employé and his employer, and no such privity on the part of the employé to the contract of insurance, as gave him or his representatives a right of action upon the policy of insurance. It is to be noted that this policy was written before the enactment of the New York statute of 1892 (chapter 690, § 55), which authorizes an employer to take out insurance for the benefit of his employés. The case of *Beacon Lamp Co. v. Travelers' Ins. Co.* (Nov., 1900) 61 N. J. Eq. 59, 47 Atl. 579, was overruled by the court of last resort, which held that the obligation of the insurer was with the employer only, and left the person who had the claim for damages on account of the accident to rely only on obligations from the insurer to the employer existing when the bill was brought. *Insurance Co. v. Moses*, 63 N. J. Eq. 260, 49 Atl. 720, 92 Am. St. Rep. 663; *Hunt v. Association*, 68 N. H. 305, 38 Atl. 145, 38 L. R. A. 415, 73 Am. St. Rep. 602, grew out of the reinsurance by a solvent company of a part of a fire risk reinsured in part by a company which became insolvent after the loss by fire; and the right of the original insurer to the fund was a right in equity to avail itself of a then subsisting provision made by his insolvent debtor, the first reinsurer, for the payment of the claim of the original insurer. Neither that case nor those of the class of *Locke v. Homer*, 131 Mass. 93, 41 Am. Rep. 199, or *Keller v. Ashford*, 133 U. S. 610, 10 Sup. Ct. 494, 33 L. Ed. 667, are put upon the ground of a trust.

If the usual result of insurance against liability for damages respecting accidental injuries to others was to give money to the insured, when he was not obliged to compensate the person injured,

it would be for the legislature to say whether such insurance should not be allowed as contrary to public policy. The insurance written by the policy held by Atkins was in fact permitted by our statutes, and for his own benefit, and not for that of the persons whose injuries might give them a claim against him. The fact that, owing to his bankruptcy, the plaintiff's claim cannot be satisfied, although he has in fact received the insurance money, or a part of it, cannot make that a trust fund which neither the statute which allowed the contract, nor the contract which created the fund, impressed with a trust. Atkins had as full a right to settle with the company, and to use in his business the proceeds of the settlement, as to deal at his will with any other part of his property; and the company had a right to settle with him as it did.

Bill dismissed, with costs.

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